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SUPREME COURT, U. S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1961

No. 234

MARIE BENZ, PETITIONER,

vs.

NEW YORK STATE THRUWAY AUTHORITY

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

PETITION FOR CERTIORARI FILED JULY 17, 1961
CERTIORARI GRANTED OCTOBER 23, 1961

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STATE OF NEW YORK

Supreme Court

APPELLATE DIVISION—FOURTH DEPARTMENT

MARIE BENZ,

Plaintiff-Appellant,

vs.

NEW YORK STATE THRUWAY AUTHORITY,

Defendant-Respondent.

2

STATEMENT PURSUANT TO RULE 234.

The nature and object of the above entitled action is for recission and/or reformation of a written agreement entered into between the plaintiff and defendant on the ground of the fraud of the defendant or the mutual mistake of the plaintiff and defendant.

The action was commenced by the service of the summons and complaint on the defendant on or about the 23rd day of November, 1959. No answer was interposed and a notice of motion to dismiss the complaint was served on December 10, 1959. 3

The action was brought in the Supreme Court of Erie County, State of New York.

The full names of the original parties are as above set forth. There has been no change of parties herein. The name of the plaintiff's at-

torneys is Rachlin & Rachlin with offices and post-office address at 710 Erie County Bank Bldg., Buffalo, New York. The defendant has appeared specially by Louis J. Lefkowitz, attorney general of the State of New York, whose office and post-office address is The Capitol, Albany, New York. The order appealed from which dismissed the complaint of the plaintiff on the ground that the court lacked jurisdiction of the subject of the action, was entered on the 10th day of March, 1960. Notice of Appeal to this court was served on the 15th day of March, 1960.

NOTICE OF APPEAL.

STATE OF NEW YORK

SUPREME COURT—COUNTY OF ERIE

—o—

MARIE BENZ,

Plaintiff.

vs.

NEW YORK STATE THRUWAY AUTHORITY,

Defendant.

—o—

Sir:

PLEASE TAKE NOTICE that Marie Benz, the plaintiff herein, appeals to the Appellate Division of the Supreme Court, Fourth Depart-

ment, from the order made in this action on the 7th day of March, 1960 by Hon. Alfred M. Kramer, Justice of the Supreme Court, and entered in the Office of the Clerk of the County of Erie on the 10th day of March, 1960 granting the motion of New York State Thruway Authority, the defendant, dismissing the complaint of the plaintiff on the ground that the Court has not jurisdiction of the subject of the action, and from each and every part of said order.

Dated: Buffalo, New York, March 15, 1960.

Yours, etc.,

RACHLIN & RACHLIN,
Attorneys for Plaintiff,
Office & P. O. Address,
710 Erie County Bank Bldg.,
Buffalo 2, New York.

To:
Louis J. Lefkowitz,
Attorney General,

and

Robert W. Grimm,
County Clerk, Erie County.

ORDER APPEALED FROM.

10 At a Special Term of the Supreme Court of the State of New York held in and for the County of Erie in Erie County Hall, Buffalo, New York, on the 4th day of March, 1960.

Present: Honorable Alfred M. Kramer,
Justice.

—o—

MARIE BENZ,
Plaintiff,

11 against

NEW YORK STATE THRUWAY AUTHORITY,
Defendant.

—o—

On reading and filing the notice of motion dated December 10, 1959, and the summons and complaint herein, and after hearing Louis J. Lefkowitz, Attorney General of the State of New York, attorney for defendant, by James L. Magavern, of counsel, in support of the motion, and
12 Rachlin & Rachlin, Esqs., attorneys for plaintiff, by Lauren D. Rachlin, Esq., in opposition thereto, and due deliberation having been had thereon, and the Court having rendered its opinion on February 11, 1960, now on motion of Louis J. Lefkowitz, attorney for defendant, it is

ORDERED that defendant's motion to dismiss the complaint be and hereby is granted on the ground that the Court has not jurisdiction of the subject of the action, and it is

Memorandum.

FURTHER ORDERED that the complaint be and hereby is dismissed. 13

Enter:

ALFRED M. KRAMER, *J. S. C.*,
Justice of the Supreme Court.

Granted:
Mar 7 1960.
Nelson M. Johnston,
Sp. Dep. Clerk.

14

MEMORANDUM.

(Same Title.)

Rachlin & Rachlin for Plaintiff.

Louis J. Lefkowitz, Attorney General, appearing specially for the New York State Thruway Authority (James L. Magavern, Deputy Assistant Attorney General, of Counsel) for Defendant.

KRAMER, J. 15

This is an action in equity brought by the plaintiff Marie Benz against the defendant New York State Thruway Authority for rescission and/or reformation of a contract entered into between the plaintiff and the defendant.

The defendant moves to set aside the service of the summons herein on the ground that the court does not have jurisdiction over the person of the defendant or in the alternative to dismiss

the complaint on the ground that the court does not have jurisdiction over the subject matter of the action.

The Court of Appeals in Psaty v. Duryea, 306 N. Y. 413 held that the Supreme Court has no jurisdiction in an action in equity brought against the State, as follows (p. 416):

> "It seems to be conceded that the Court of Claims has, under § 9 of the Court of Claims Act, no jurisdiction to grant strictly equitable relief, but to award money damages only against the State, in appropriate cases. Plaintiffs assert that they, accordingly, could not have obtained relief against the State in the Court of Claims on this claim, since they would have no rights unless and until their bid should be cancelled and rescinded, and that the Court of Claims, being without such equity jurisdiction, could not annul the bid. Therefore, say plaintiffs, they were compelled to bring this suit in equity in the Supreme Court to be relieved from their bid, to have the same declared cancelled, and for an injunction to keep the State officials from putting the money into the State's general funds. Such would be a proper subject for the exercise of the equitable jurisdiction of the Supreme Court were it not for the fact that defendants are sued as officers of the State, dealing, within their powers, with moneys paid to the State, and that, accordingly, this is

a suit against the State under the theory 19
of Samuel Adler, Inc. v. Noyes (285 N. Y. 34), Breen v. Mortgage Comm. of State of N. Y. (285 N. Y. 425), and Niagara Falls Power Co. v. White (292 N. Y. 472). Since, therefore, it is such a suit against the State itself, the Appellate Division was correct in its unanimous dismissal of the suit on the jurisdictional ground since, concededly, the State has not given consent so to be sued. In the Presiding Justice's opinion for the unanimous Appellate Division, it is 20
stated that the broad grant of power given to the Court of Claims in §§ 8, 9 and 12 of the Court of Claims Act 'necessarily implies the right to afford equitable relief where the same may be incidental to a claim for a money judgment'. (282 App. Div. 94, 99). We need not determine the full reach of that statement of law, since appellants' contentions are defeated by the fact that this is a suit against the State itself attempted to be brought in the Supreme 21
Court and, as such, subject to dismissal. We may assume that, in determining claims for money damages against the State, the Court of Claims may apply equitable considerations and perhaps, to some extent, may grant some sort of incidental equitable relief, but that concept has nothing to do with this case since this, in essence and by concession, is not a suit for money damages but, primarily, an equitable action to

22 cancel and rescind a bid which equitable relief, as plaintiffs concede, was essential before there could be any injunction or mandate for the return of the money. In other words, this was a suit for traditional equitable relief, with the return of the money to follow as a consequence of the equitable relief, if granted."

In Easley v. New York State Thruway Authority, 1 N. Y. 2d 374 at p. 376, the Court of Appeals held that the summons was properly set
23 aside and complaint dismissed in an action brought in the Supreme Court to recover damages by reason of the negligence of the defendant New York State Thruway Authority, as follows:

"DESMOND, J. The question is as to the validity of section 361-b of the Public Authorities Law, enacted in 1954, which confers exclusive jurisdiction upon the Court of Claims to hear and determine all claims
24 against the New York State Thruway Authority for alleged torts or breaches of contract. The Thruway Authority is 'a body corporate and politic constituting a public corporation' (Public Authorities Law, § 352) which performs part of the work of the State Government in building and maintaining a highway. It cannot be doubted that this Authority is an arm or agency of the State. The closeness of its relationship (cf. Glassman v. Glassman, 309 N. Y. 436, 441)

to the State is illustrated by these situations among others: its members are appointed by the Governor with the approval of the Senate, its statutory purposes are declared to be 'in all respects for the benefit of the people of the state', its functions are statutorily declared to be 'governmental'; its real property is held in the name of the State, the State advanced the money for constructing the Thruway, the State's Public Works Department designed and supervised the construction work, the legal services are performed by the Attorney General, the Authority must annually report to the Governor and Legislature, its funds are held by the State Comptroller, its bond are guaranteed by the State pursuant to the vote of the People, and, eventually, the Authority's properties will revert to the State itself (see Public Authorities Law, art. 2, tit. 9; Highway Law, art. XII-a). Since the State as sovereign may assert, waive, or condition at will immunity from suit for itself and its agents (see Matter of Brown v. Board of Trustees of Hamptonburg School Dist., 303 N. Y. 484, 489), the Legislature could in creating the Thruway Authority have refused to waive immunity as to it and thus could have forbidden suits to be maintained against the Authority in any court or tribunal. Therefore, the only question here is as to whether the State Constitution so limits the jurisdiction of the

25

26

27

Court of Claims that the Legislature could not validly confer on that court jurisdiction over claims that are asserted not against the State itself but against such an 'Authority'. We see nothing in the language or history of section 23 of article VI of the Constitution to support such a construction."

In Glassman v. Glassman, 309 N. Y. 436 at p. 441 of the opinion, the Court of Appeals states as follows:

"[4] Indeed, plaintiff's brief presents no direct challenge to the System's status as a state agency. Instead, she urges that immunity should be denied the System because, first, she has no other remedy, since the Court of Claims would have no jurisdiction over either an equitable action of this kind (cf. Psaty v. Duryea, *supra*, 306 N. Y. 413, 416-417, 118 N. E. 2d 584, 585-586) or the person of the individual defendant and, second, the System enjoys the powers and privileges of a corporation and, therefore, 'must also accept the responsibilities of a corporation' and be amenable to the jurisdiction of a court of equity. In our view, neither of these contentions can assist plaintiff; the immunity of a state agency is in no way affected by the lack of any other remedy (see Psaty v. Duryea, *supra*, 306 N. Y. 413, 419-420, 118 N. E. 2d 584, 587-588; Buckles v. State of New York, 221 N. Y. 418, 423-424, 117 N. E. 811, 812-

813) or by the fact that the agency is endowed with the powers and privileges of a corporation. (See, *e.g.*, Breen v. Mortgage Commission of State of New York, *supra*, 285 N. Y. 425, 430, 35 N. E. 2d 25, 27; Matter of Hicka, 180 Misc. 173, 175-6, 40 N. Y. S. 2d 267, 269-270; State of Arkansas v. State of Texas, 346 U. S. 368, 370, 74 S. Ct. 109, 98 L. ed. 80)." 31

Adhering to the principles set forth in the cases cited above, this Court is of the opinion that it has no jurisdiction of the subject matter of the action (Rule 106, subd. 1 of the Rules of Civil Practice). 32

Accordingly, defendant's motion to dismiss the complaint on the ground that the Court does not have jurisdiction over the subject matter of the action is granted.

Submit order.

Dated: February 11, 1960.

33

ALFRED M. KRAMER,
Justice of Supreme Court.

SUMMONS.

(Same Title.)

To the Above Named Defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer, or, if the complaint is not served with

34 this summons, to serve a notice of appearance, on the plaintiff's attorneys within twenty days after the service of this summons, exclusive of the day of service. In case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

The plaintiff resides in the County of Erie.

Trial to be held in the County of Erie.

Dated this 18th day of November, 1959.

35

RACHLIN & RACHLIN,
Attorneys for Plaintiff.

COMPLAINT.

(Same Title.)

The plaintiff above named by Rachlin & Rachlin, her attorneys, for her cause of action against the defendant herein alleges:

36 1. That at all times hereinafter mentioned plaintiff was and still is a resident of the Town of Hamburg, County of Erie and State of New York.

2. That at all times hereinafter mentioned defendant was and still is a public corporation organized and existing under the laws of the State of New York, and created pursuant to Chapter 143 of the Laws of 1950.

3. That heretofore and on or about the 10th day of November, 1955, plaintiff and defendant

entered into an agreement in writing, a true 37
copy of which is hereto annexed, marked Exhibit "A" and made a part of this complaint, wherein and whereby the defendant agreed to pay and the plaintiff agreed to accept as compensation for all damages to the plaintiff by reason of the defendant's appropriation of the land of the plaintiff specified therein, the sum of Three Thousand Five Hundred Dollars ($3,500.00).

4. That the lands of the plaintiff thus ap- 38
propriated by the defendant bisected the total tract of land owned by the plaintiff and resulted in the major portion of said land becoming inaccessible to the plaintiff.

5. That one William Hennessy was the agent of the defendant for the negotiation of the price to be paid to the plaintiff for the value of her property appropriated by the defendant.

6. That one William Hennessy was the agent of the defendant for the negotiation of the said 39
agreement marked Exhibit "A" with the plaintiff.

7. That prior to the execution of the said Exhibit "A", and at the time of the execution thereof by the plaintiff, the said William Hennessy represented to the plaintiff that the compensation she was to receive for her said land was to be $3,500.00, plus 90% of the value of that portion of the plaintiff's land which had been severed from that which had frontage on

40 South Park Avenue, plus an additional sum which would compensate the plaintiff for the purchase of an access route to the said rear tract. That at the time of the execution by the plaintiff of the said agreement marked Exhibit "A", the said William Hennessy specifically represented to the plaintiff that the $3,500.00 set forth in Exhibit "A" constituted only a portion of the total compensation which she was to receive.

8. Upon information and belief that at many times subsequent to the execution of the said
41 agreement marked Exhibit "A", the defendant, by its agents, repeated the aforesaid representations, causing the plaintiff to rely thereon.

9. Upon information and belief that the sum of $3,500.00 represents approximately 1/20th of the value of the land appropriated by the defendant.

10. That by mutual mistake of the plaintiff and defendant or by the mistake of the plaintiff and the fraud of defendant in concealing its
42 knowledge thereof, the said contract marked Exhibit "A" was incorrectly drawn and does not state the actual agreement between the parties as hereinabove set forth.

11. That the plaintiff executed the said written agreement believing that it set forth in its terms the actual agreement made between plaintiff and defendant as hereinbefore alleged, and that plaintiff has repeatedly sought to have the

said actual agreement performed by the defendant. 43

12. That on or about the 4th day of November, 1959, plaintiff consulted counsel and was advised for the first time that the said Exhibit "A" purported to be an agreement to pay $3,500.00 for all damages sustained by her by reason of such appropriation, and plaintiff immediately brought this action to reform the agreement to conform to the actual agreement of the parties as hereinbefore set forth.

44

13. That the plaintiff has no adequate remedy at law.

FOR A SECOND, SEPARATE AND DISTINCT CAUSE OF ACTION AGAINST THE DEFENDANT HEREIN, PLAINTIFF ALLEGES:

14. Repeats and realleges the allegations contained in paragraphs "1" through "9" inclusive with the same force and effect as if fully set forth herein. 45

15. That the aforesaid representations were false and fraudulent and were known or should have been known to be so by the defendant at the time of making same, and were made by the defendant's agent for the purpose of inducing the plaintiff to enter into the said agreement.

16. That the plaintiff relied on said representations and was thereby induced to enter the said agreement marked Exhibit "A".

46 17. That the plaintiff has no adequate remedy at law.

WHEREFORE, plaintiff demands judgment against the defendant:

1. That the said agreement marked Exhibit "A" be reformed by adding thereto as a part of the compensation to the plaintiff for the value of the lands appropriated from her by the defendant, 90% of the value of the rear tract of land severed by the defendant's appropriation, 47 plus the cost of securing access thereto.

2. Or in the alternative, that the said agreement marked Exhibit "A" be rescinded and declared null and void because of the fraudulent misrepresentation and mistake set forth herein.

3. That plaintiff have such other and further relief as to the Court may seem just and proper, together with the costs and disbursements of this action.

48

RACHLIN & RACHLIN,
Attorneys for Plaintiff.

(Verified by plaintiff on November 18, 1959.)

EXHIBIT A ANNEXED TO COMPLAINT.

NEW YORK STATE THRUWAY AUTHORITY

RIGHTS OF WAY AND CLAIMS

CLAIMANT

AGREEMENT OF ADJUSTMENT

Project N. Y. S. Thruway—Erie Section—Sub. Div. #Ec.

Map No. 639 Parcel No (s) 639
Map No. 644 Parcel No (s) 644
Map No. 646 Parcel No (s) 646

County Erie
Town Hamburg
City or Village

THIS AGREEMENT, made this 10th day of November, 1955 between Marie Benz, residing @ 320 E. Main Hamburg, N. Y. hereinafter referred to as "the first party" and the New York State Thruway Authority, hereinafter referred to as "the second party", pursuant to Article 2, Title 9 of the Public Authorities Law and Article XII-A of the Highway Law.

WITNESSETH:

WHEREAS, pursuant to the aforementioned statute, the Superintendent of Public Works of the State of New York hereinafter referred to as "the State" is appropriating or has appropriated, for the purpose of the above identified project, certain property shown and described on the above designated map(s); and

Exhibit A annexed to Complaint.

52 WHEREAS, the first party was, at the time of said appropriation, the owner of the property affected by said appropriation or of same right, title or interest therein;

NOW, THEREFORE, it is understood and agreed by and between the parties hereto as follows:

1. The compensation to be paid by the second party for the total value of the property so appropriated and for all legal damages caused
53 by such appropriation, including all damages incurred by virtue and during the pendency of said appropriation proceedings, and including all damages to the remainder of said affected property of which the appropriated area formed a part, whether caused by said appropriation or by the use of said appropriated property, excepting the aggregate value, if any, of claims hereinafter specifically excluded, is the sum of Three Thousand Five Hundred and no/100 Dollars ($3500.00/00).

54 2. The first party agrees, as a prerequisite to such payment, to execute and deliver or cause the execution and delivery to the Attorney-General of all formal papers which the Attorney-General deems necessary to authorize payment and to secure to the New York State Thruway Authority, The People of the State of New York and the said Superintendent of Public Works a full release of all claims by reason of the aforementioned appropriation and by reason of any estate or interest in the streams, lakes, streets,

roads, highways or rights of way, if any, adjacent to or abutting on the above mentioned property required for the purposes of said project.

3. The aforesaid compensation is to be paid hereunder only upon approval by the Comptroller of the State of New York and upon certificate of the Attorney-General of the State of New York as required by law.

4. This agreement is exclusive of the claims, if any, of persons other than owners of the appropriated property, their tenants, mortgagees and lienors, having any right or interest in any stream, lake, street, road, highway or right of way, or the bed thereof, within the limits of the appropriated property or contiguous thereto.

5. This agreement is also exclusive of claims, if any, for the value of or damage to easements and appurtenant facilities for the construction, operation and maintenance of public service electric, telephone and telegraph, pipe and railroad lines.

6. The amount agreed upon herein as compensation shall be binding and conclusive on the parties hereto in any action or proceeding with relation to the aforesaid appropriation as representing the total value of the property so appropriated, together with all legal damages caused by or consequent upon such appropriation, as aforesaid.

7. This agreement is also exclusive of any claim of others under any lease covering oil, gas or mineral rights provided that at the time

Exhibit A annexed to Complaint.

title to property shown on said map(s) vested in State such instrument or any assignment thereof, has been on public record not less than six years and that there is no physical indication of work thereunder for a like period.

THIS AGREEMENT shall inure to the benefit of and bind the distributees, legal representatives, successors and assigns of the first party.

IN WITNESS WHEREOF, the parties hereto have executed this agreement the day and year first above written.

MARIE BENZ.

William Hennessy,
(Witness)
Silver Creek, New York.
(Address)

NEW YORK STATE THRUWAY AUTHORITY,

By P. G. BALDWIN.
(Director, Rights of Way and Claims)

DEC 5 1955

LAND ACCOUNT #1.

Approved Dec 19 1955,
W. Kelly,
For the State Comptroller.
JW.

NOTICE OF MOTION.

(Same Title.) 61

Sirs:

PLEASE TAKE NOTICE that upon the summons and complaint herein the undersigned, appearing specially for the New York State Thruway Authority, pursuant to Section 237-a of the Civil Practice Act, will move this Court at a Special Term thereof to be held in and for the County of Erie in Erie County Hall, Buffalo, New York, on December 28, 1959, at 10:00 A. M. to set aside the service of the summons herein 62 on the ground that the Court does not have jurisdiction over the person of defendant, or in the alternative, to dismiss the complaint on the ground that the Court does not have jurisdiction over the subject matter of the action, and for such other and further relief as to the Court may seem just and proper.

PLEASE TAKE FURTHER NOTICE that pursuant to Rule 65 of the Rules of Civil Practice you are required to file with the Court on the 63 return date hereof the originals of the summons and complaint herein.

Dated: Albany, New York, December 10, 1959.

LOUIS J. LEFKOWITZ,
Attorney General,
Appearing specially for the New York State Thruway Auth.

To:
Rachlin & Rachlin, Esqs.,
Attorneys for Plaintiff.

STIPULATION WAIVING CERTIFICATION.

64 (Same Title.)

IT IS HEREBY STIPULATED by and between the attorneys for the respective parties hereto that the within record contains true and correct copies of all the original papers, and of the whole thereof, which were used in the Court below and are specified in the Order of the Hon. Albert M. Kramer, granted March 7, 1960, and entered in the Office of the Clerk of the County of Erie on March 10, 1960, and that the
65 same may be filed as the record on appeal, and certification thereof by the Erie County Clerk is hereby waived.

Dated: Buffalo, New York, April ...., 1960.

RACHLIN & RACHLIN,
Attorneys for Appellant.

LOUIS J. LEFKOWITZ,
Attorney for Respondent.

66

NOTICE OF APPEAL.

STATE OF NEW YORK 67
COURT OF APPEALS

———o———

MARIE BENZ,
Plaintiff-Appellant,

vs.

NEW YORK STATE THRUWAY AUTHORITY,
Defendant-Respondent.

———o——— 68

Sirs:

PLEASE TAKE NOTICE, that pursuant to permission granted by this Court by order dated the 6th day of October, 1960, plaintiff hereby appeals to the Court of Appeals from the order of the Appellate Division of the Supreme Court, Fourth Department, entered in the Office of the Clerk of that Court on the 1st day of July, 1960, affirming the order herein of the Supreme Court, Erie County, entered in the Office of the Clerk 69
of the County of Erie on the 10th day of March, 1960.

Dated: Buffalo, New York, October 13, 1960.

Yours, etc.,

RACHLIN & RACHLIN,
Attorneys for Plaintiff-Appellant.
Office & P. O. Address,
710 Erie County Bank Bldg.,
Buffalo 2, New York.

Notice of Appeal.

70 To:

Louis J. Lefkowitz, Esq.,
Attorney General,
The Capitol,
Albany, New York.

Robert W. Grimm, Esq.,
County Clerk, Erie County,
Erie County Hall,
Buffalo, New York.

71

72

NOTICE OF APPEAL FROM JUDGMENT.

COURT OF APPEALS

OF THE

STATE OF NEW YORK

—o—

MARIE BENZ,

Plaintiff-Appellant,

vs.

NEW YORK STATE THRUWAY AUTHORITY,

Defendant-Respondent.

—o—

Sirs:

PLEASE TAKE NOTICE, that pursuant to permission granted by this Court by order dated the 6th day of October, 1960, plaintiff hereby appeals from the judgment of the Supreme Court of the State of New York, entered in the Office of the Clerk of the County of Erie on the 29th day of July, 1960, upon the order of the Appellate Division of the Supreme Court, Fourth Department entered in the Office of the Clerk of that Court on the 1st day of July, 1960, affirming the order herein of the Supreme Court, Erie

Notice of Appeal From Judgment.

70b County, entered in the Office of the Clerk of the County of Erie on the 10th day of March, 1960.

Dated: Buffalo, New York, October 28, 1960.

Yours, etc.,

RACHLIN & RACHLIN,
Attorneys for Plaintiff-Appellant,
Office & P. O. Address,
710 Erie County Bank Bldg.,
Buffalo 2, New York.

71b To:

Louis J. Lefkowitz, Esq.,
Attorney General,
The Capitol,
Albany, New York.

Robert W. Grimm, Esq.,
County Clerk, Erie County,
Erie County Hall,
Buffalo, New York.

72b

ORDER GRANTING LEAVE TO APPEAL.

STATE OF NEW YORK 73

COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Sixth day of October A. D. 1960.

Present: Hon. Charles S. Desmond,
Chief Judge, presiding.

—o—

Mo. No. 455. 74

MARIE BENZ,

Appellant,

vs.

NEW YORK STATE THRUWAY AUTHORITY,

Respondent.

—o—

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been duly submitted thereon and due deliberation thereupon had: 75

ORDERED, that the said motion be and the same hereby is granted.

A copy

GEARON KIMBALL,
(Seal) *Deputy Clerk.*

ORDER OF AFFIRMANCE.

76 At a Term of the Appellate Division of the Supreme Court of the State of New York, in and for the Fourth Judicial Department, at the City of Rochester, N. Y., commencing on the 29th day of June, 1960.

Present—Hon. Alger A. Williams,
Presiding Justice.

" Earle C. Bastow,
" Philip Halpern,
77 " William E. McClusky,
" Frederic T. Henry,
Associate Justices.

———o———

MARIE BENZ,
Appellant,

vs.

NEW YORK STATE THRUWAY AUTHORITY,
Respondent.

78 ———o———

The above named Marie Benz, plaintiff in this action, having appealed to the Appellate Division of the Supreme Court, Fourth Department, from an order of the Supreme Court, entered in the office of the Clerk of the County of Erie, on the 10th day of March, 1960, and the said appeal having been argued by Mr. Lauren D. Rachlin, of counsel for the appellant, and by Mr. Julius L. Sackman, of counsel for the respondent, and due deliberation having been had thereon

Order of Affirmance.

It is hereby ORDERED, That the order so appealed from be, and the same hereby is, unanimously affirmed without costs of this appeal to either party. 79

Enter.

ALGER A. WILLIAMS.

Entered 1st day of July, 1960
Herbert E. Wait,
Clerk.

80

NOTICE OF ENTRY.

Sir:

Take notice that the within is a copy of an order duly filed and entered in the office of the Clerk of App. Div. Fourth Dept., on the 1st day of July, 1960.

Yours, etc.,

LOUIS J. LEFKOWITZ, 81
Attorney General,
Attorney for Respondent.
Office and Post Office Address,
Capitol, Albany 1, N. Y.

To:
Rachlin & Rachlin, Esqs.,
Attorneys for Plaintiff-Appellant.
710 Erie County Bank Bldg.,
Buffalo 2, N. Y.

DECISION AND OPINION OF APPELLATE DIVISION.

82

221. (Erie Co.)—Marie Benz, Appellant, vs. New York State Thruway Authority, Respondent.

—Order unanimously affirmed without costs of this appeal to either party. (Appeal from order of Erie Special Term, Kramer, J., dismissing plaintiff's complaint.) Present: Williams, P. J., Bastow, Halpern, McClusky, and Henry, JJ.

83

84

JUDGMENT.

At a Special Term of the Supreme Court held in and for the County of Erie at the Erie County Hall, Buffalo, New York on the 29th day of July, 1960. 85

Present: Hon. Michael Catalano, *J. S. C.*,
Justice Presiding.

STATE OF NEW YORK

SUPREME COURT—County of Erie

—o—

MARIE BENZ, 86
Plaintiff.

vs.

NEW YORK STATE THRUWAY AUTHORITY,
Defendant.

—o—

The above named plaintiff having appealed to the Appellate Division, Fourth Department, from an Order of the Supreme Court, Erie County, entered in this action on the 10th day of March, 87
1960, and the Appellate Division, Fourth Department, having heard said appeal and ordered and adjudged that the Order so appealed from be affirmed without costs.

NOW, on motion of Louis J. Lefkowitz, attorney for defendant, it is

ADJUDGED, that the Order in this action entered on the 10th day of March, 1960, be and the same hereby is affirmed, and it is further

Judgment.

88 ADJUDGED, that the complaint of the plaintiff herein, be and the same hereby is dismissed, without costs of this appeal to either party.

Enter:

MICHAEL CATALANO,
J. S. C.

Granted:
Jul 29 1960.
V. P. Reilly,
89 Sp. Dep. Clerk.

NOTICE OF ENTRY.

Sir:

Take notice of a Judgment of which the within is a copy, duly granted in the within entitled action, on the 29th day of July, 1960, and duly entered in the office of the Clerk of the County of Erie on the 29th day of July, 1960.

Dated: Buffalo, New York, July 29, 1960.
90

LOUIS J. LEFKOWITZ,
Attorney General,
Attorney for Defendant.
Office and Post Office Address,
Capitol, Albany 1, N. Y.

To:
Rachlin & Rachlin, Esqs.,
Attorneys for Plaintiff.
Office and Post Office Address,
710 Erie County Bank Bldg.,
Buffalo 2, N. Y.

STIPULATION WAIVING CERTIFICATION.

(Same Title.)

IT IS HEREBY STIPULATED by and between the attorneys for the respective parties hereto that the within record contains true and correct copies of all the original papers, and of the whole thereof, which were used in the Courts below, and the notice of appeal and the judgment of the Appellate Division, as filed in the Erie County Clerk's Office, and that the same may be filed as the record of appeal, and certification thereof by the Erie County Clerk is hereby waived.

Dated: Buffalo, New York, October ...., 1960.

RACHLIN & RACHLIN,
Attorneys for Appellant.

LOUIS J. LEFKOWITZ,
Attorney for Respondent.

[fol. 32]

IN THE COURT OF APPEALS OF THE STATE OF NEW YORK

MARIE BENZ, Appellant,

v.

NEW YORK STATE THRUWAY AUTHORITY, Respondent.

OPINION—Argued March 1, 1961; decided April 27, 1961

Chief Judge DESMOND: The courts below, bound as they were by *Easley* v. *New York State Thruway Auth.* (1 N Y 2d 374), correctly held that the Supreme Court has no jurisdiction of this equity suit (or of the equity suit of *Matheuson* v. *New York State Thruway Auth.*, 9 N Y 2d 788, decided herewith). *Easley* held that the Thruway Authority "is an arm or agency of the State" (p. 376) and that "the Legislature could in creating the Thruway Authority have refused to waive immunity as to it and thus could have forbidden suits to be maintained against the Authority in any court or tribunal" (pp. 376-377). Easley's brief on his appeal to this court made (and we rejected) the identical arguments now made by appellant Benz. The *Easley* decision necessarily meant that there is no jurisdiction in any court of any suit against the Thruway Authority except as the Legislature has in terms created such jurisdiction.

There are just two statutory grants of jurisdiction to sue the Authority. One of them, section 361-b of the Public Authorities Law, discussed in *Easley* (*supra*), confers exclusive jurisdiction upon the Court of Claims to hear and determine all claims against the Authority for alleged torts or breaches of contract. That enactment certainly does not authorize the bringing of these suits in the Supreme Court. The only other statutory grant of jurisdiction to bring actions against the Authority is in subdivision 5 of section 368 of the Public Authorities Law whereby the Legislature in order to permit one particular type of equity

suit against the Thruway Authority enacted a special statute therefor.

[fol. 33] In the *Easley* opinion (*supra*) we described at length the peculiarly close relationship between the Authority and the State itself and we concluded that for purposes of suit the Thruway Authority was part of the State Government and, accordingly, not suable without a direct waiver of immunity. The reasons for that holding were exactly the same as in *Breen* v. *Mortgage Comm.* (285 N. Y. 425) and the reasons why the present suit cannot be maintained against the Authority are the same reasons explained by us in *Breen*. Section 8 of the Court of Claims Act did not, so we directly held in the *Breen* opinion, authorize a suit by Breen in the Supreme Court and this situation was not affected by the statutory direction as to the Mortgage Commission that it may "sue and be sued". The same authorization as to the Thruway Authority (Public Authorities Law, § 354, subd. 1) has no broader meaning.

There may have been some doubt prior to 1954 (see dictum in *Strang* v. *State of New York*, 206 Misc. 734) as to jurisdiction of such suits as these but that doubt was removed by the legislative determination in 1954, before the Authority began to operate the Thruway, that there would be no jurisdiction of suits against the Authority except in the Court of Claims as to tort and contract claims and in the Supreme Court as to certain suits by bondholders (Public Authorities Law, §§ 354, 368). There is no provision anywhere for equity suits against the Thruway Authority. It would indeed be remarkable if the Legislature which "could have forbidden suits to be maintained against the Authority in any court or tribunal" produced a situation where suits at law could be prosecuted (per express enactment) in the Court of Claims only but (by legislative silence) equity suits would be allowed against the Thruway Authority in the Supreme Court. There is no sign that the lawmakers had any such strange intent.

[fol. 34] This leaves plaintiff without any remedy by suit but "the immunity of a state agency is in no way affected

by the lack of any other remedy" (*Glassman* v. *Glassman*, 309 N. Y. 436, 441; see *Psaty* v. *Duryea*, 306 N. Y. 413, 420).

The judgment should be affirmed, without costs.

Van Voorhis, J. (Dissenting). This is an equitable action in the Supreme Court for rescission or reformation of a contract for the sale of land to the New York State Thruway Authority. The complaint alleges that due to mutual mistake or mistake of plaintiff induced by fraud of defendant's agent the purchase price in this contract amounted to approximately 1/20 of the agreed value of the appropriated land. The complaint has been dismissed on motion for lack of jurisdiction on the basis that the Thruway Authority enjoys governmental immunity from suits of this nature. The answer to this question requires examination of the doctrine of governmental immunity and of the decisions on the nature of the Thruway Authority as a public authority.

Section 8 of the Court of Claims Act was amended in 1939 so as to provide: "The state hereby waives its immunity from liability and action and hereby assumes liability and consents to have the same determined *in accordance with the same rules of law as applied to actions in the supreme court against individuals or corporations*, provided the claimant complies with the limitations of this article" (italics supplied). This section is held to constitute a waiver of the governmental immunity of all of the civil divisions of the State—counties, cities, towns, villages, and by the same token, public authorities (*Bernardine* v. *City of New York*, 294 N. Y. 361). In the *Bernardine* case this court said (p. 365): "The legal irresponsibility heretofore enjoyed by these governmental units was nothing more than an extension of the exemption from liability which the State possessed." Ironically this waiver is circumscribed in causes of action against the State itself, due to the circumstance that the State can be sued only in the Court of Claims and section 9 of the Court of Claims [fol. 35] Act has been held to be too narrow to cover jurisdiction over equitable actions (*Psaty* v. *Duryea*, 306 N. Y. 413). This does not alter the fact that all other

governmental units in the State may be sued in the Supreme Court like individuals or private corporations (Court of Claims Act, § 8; *Bernardine* v. *City of New York*, *supra*). Waiver of governmental immunity is a consequence of the "rising tide of criticism against the doctrine of sovereign irresponsibility" (*Miller* v. *Town of Irondequoit*, 243 App. Div. 240, 241, per *Lewis*, J., affd. 268 N. Y. 578). It is not the policy of the courts to restrict the waiver of immunity which has become so firmly a part of the public policy of the State.

Upon the creation of the New York State Thruway Authority in 1950 as "a body corporate and politic" (Public Authorities Law, § 352) with power "To sue and be sued" (Public Authorities Law, § 354, subd. 1), it could be sued in like manner as a private corporation in view of the waiver of immunity from liability ordained by section 8 of the Court of Claims Act expressly applying "to actions in the supreme court" (*Paatess* v. *Saratoga Springs Auth.*, 255 App. Div. 426). Indeed, until the adoption in 1954 of section 361-b of the Public Authorities Law, the Attorney-General's office successfully maintained that the Supreme Court had jurisdiction even of tort claims against the Thruway Authority to the exclusion of the jurisdiction of the Court of Claims (*Strang* v. *State of New York*, 206 Misc. 734).

In 1954 section 361-b was added to the Public Authorities Law purporting to confer upon the Court of Claims exclusive jurisdiction of claims against the Thruway Authority for its tortious acts and for breach of contract. The constitutionality of that section was tested in *Easley* v. *New York State Thruway Auth.* (1 N Y 2d 374) which was [fol. 36] challenged in view of the section added in 1950 to the State Constitution providing that the Court of Claims shall have jurisdiction to hear and determine claims against the State (art. VI, § 23). There was held to be sufficient identity between the Thruway Authority and the State to give effect to section 361-b of the Public Authorities Law notwithstanding this provision in the State Constitution.

Nevertheless, it was recognized in *Matter of Plumbing Assn.* v. *New York State Thruway Auth.* (5 N Y 2d 420, 424) that the *Easley* decision does not mean that the *Thruway* Authority "*is* the State" (italics from original), but

that it is a public corporation "independent and autonomous, deliberately designed to be able to function with a freedom and flexibility not permitted to an ordinary State board, department or commission." (p. 423). If there had been held to be the identity between the State and the Thruway Authority that is asserted on this appeal, the *Plumbing Association* case could not have been decided as it was.

Easley (*supra*) did not hold that actions against the Thruway Authority were forbidden to be maintained in the Supreme Court by section 9 of the Court of Claims Act, but only that causes of action in tort and for breach of contract were required to be prosecuted in the Court of Claims by section 361-b of the Public Authorities Law. Between 1950 and 1954, prior to the enactment of section 361-b, the Thruway Authority could, indeed, be sued only in the Supreme Court. Section 361-b of the Public Authorities Law does not purport (like Court of Claims Act, § 9) to provide that the Thruway Authority is immune from suit except in the Court of Claims. It simply directs, as stated in its title, that exclusive jurisdiction "in certain suits against the authority" is conferred upon the Court of Claims. The Legislature deemed it advisable that claims against the Authority for tort or breach of contracts for [fol. 37] construction, maintenance or operation should be decided in the Court of Claims, as they would be if they concerned ordinary State highways, but the Legislature was careful to state that exclusive jurisdiction in suits against the Authority was vested in the Court of Claims in those instances only. If the intention had been to confer exclusive jurisdiction on the Court of Claims in all instances, it would have been simple to have said so. The reason for the elaboration in the wording of this section is evidently to define the types of suits against the Authority which are cognizable solely by the Court of Claims reserving jurisdiction in the Supreme Court over other causes of action within the general waiver of immunity expressly applicable to it (Court of Claims Act, § 8).

For these reasons, the order was erroneously granted dismissing the complaint on the ground that the Supreme Court has not jurisdiction of the subject of the action and the judgment entered thereon should be reversed.

Judges Dye, Froessel and Foster concur with Chief Judge Desmond; Judge Van Voorhis dissents in an opinion in which Judges Fuld and Burke concur.

Judgment affirmed.

[fol. 38] Triple Certificate to foregoing paper (omitted in printing).

[fol. 39]

IN THE COURT OF APPEALS OF THE STATE OF NEW YORK

Witness, The Hon. Charles S. Desmond, Chief Judge, Presiding.

Raymond J. Cannon, Clerk.

No. 371

MARIE BENZ, Appellant,

vs.

NEW YORK STATE THRUWAY AUTHORITY, Respondent.

REMITTITUR—April 27, 1961

Be it Remembered, that on the 2nd day of November in the year of our Lord 1960, Marie Benz, the appellant - in this cause, came here unto the Court of Appeals, by Rachlin & Rachlin, her attorneys, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the Fourth Judicial Department and New York State Thruway Authority, the respondent - in said cause, afterwards appeared in said Court of Appeals by Louis J. Lefkowitz, Attorney General. Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, the said Court of Appeals having heard this cause argued by Mr. Lauren D. Rachlin, of counsel for the appellant, and by Mr. Julius L. Sackman, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate

Division of the Supreme Court appealed from herein be and the same hereby is affirmed, without costs. And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

Therefore it is considered that the said judgment be affirmed, without costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

Raymond J. Cannon, Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office, Albany, April 27, 1961

[Seal—State of N. Y. Court of Appeals]

Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 40]

IN THE COURT OF APPEALS OF THE STATE OF NEW YORK

Mo. No. 571

MARIE BENZ, Appellant,

vs.

NEW YORK STATE THRUWAY AUTHORITY, Respondent.

ORDER AMENDING THE REMITTITUR—October 5, 1961

Motion to amend the remittitur granted. Return of remittitur requested and, when returned, it will be amended by adding thereto the following: Upon the appeal herein there was presented and necessarily passed upon a question

under the Constitution of the United States, viz.: Whether plaintiff was deprived of just compensation in violation of the due process clause of the Fourteenth Amendment. The Court of Appeals held there was no such deprivation or violation.

[fol. 41]

No. 371 Form 6

In the Court of Appeals of the State of New York

Witness, The Hon. Charles S. Desmond, Chief Judge, Presiding.

Raymond J. Cannon, Clerk.

Remittitur—April 27, 1961

[fol. 42]

4 No. 371

Marie Benz, Appellant,

vs.

New York State Thruway Authority, Respondent.

Be it Remembered, That on the 2nd day of November in the year of our Lord one thousand nine hundred and sixty, Marie Benz, the appellant - in this cause, came here unto the Court of Appeals, by Rachlin & Rachlin, her attorneys, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the Fourth Judicial Department. And New York State Thruway Authority, the respondent - in said cause, afterwards appeared in said Court of Appeals by Louis J. Lefkowitz, Attorney General.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

[fol. 43] Whereupon, The said Court of Appeals having heard this cause argued by Mr. Lauren D. Rachlin, of

counsel for the appellant -, and by Mr. Julius L. Sackman, of counsel for the respondent -, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, without costs. And thereafter a motion to amend the remittitur having been granted this remittitur is hereby amended by adding thereto the following: Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz.: Whether plaintiff was deprived of just compensation in violation of the due process clause of the Fourteenth Amendment. The Court of Appeals held there was no such deprivation or violation.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

[fol. 44] Therefore, it is considered that the said judgment be affirmed, without costs, &c., as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

Raymond J. Cannon, Clerk of the Court of Appeals of the State of New York.

[fol. 45] Clerks' Certificates to foregoing paper (omitted in printing).

[fol. 46]

SUPREME COURT OF THE UNITED STATES

No. 234, October Term, 1961

MARIE BENZ, Petitioner,

vs.

NEW YORK STATE THRUWAY AUTHORITY

ORDER ALLOWING CERTIORARI—October 23, 1961

The petition herein for a writ of certiorari to the Court of Appeals of the State of New York is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Office Supreme Court, U.S.
FILED
JUL 17 1961
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1961

No. 234

MARIE BENZ, 320 East Main Street,
Hamburg, New York,

Petitioner,

vs.

NEW YORK STATE THRUWAY AUTHORITY,
119 Washington Avenue, Albany, New York,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

LAUREN D. RACHLIN,
Counsel for Petitioner,
710 Erie County Bank Building,
Buffalo 2, New York.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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IN THE

Supreme Court of the United States

October Term, 1961

No. .....

MARIE BENZ, 320 East Main Street,
Hamburg, New York,

Petitioner,

vs.

NEW YORK STATE THRUWAY AUTHORITY,
119 Washington Avenue, Albany, New York,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York, entered in the above entitled case on May 8, 1961 pursuant to a decision dated April 27, 1961.

Citations to Opinions Below

The memorandum opinion of the Supreme Court of the State of New York is unreported and is printed at pages 5-11 of the Record. The memorandum of the Appellate Division of the Supreme Court is reported at 11 App.

Div. 2d 906, 205 N. Y. Supp. 2d 1004, and is printed, together with the Court's order, at pages 26-28 of the Record.

The majority and dissenting opinions of the Court of Appeals of the State of New York are reported at 9 N. Y. 2d 486; 215 N. Y. Supp. 2d 47; 174 N. E. 2d 727; and are printed in Appendix A, *infra.*

Jurisdiction

The judgment of the Court of Appeals of the State of New York was made and remitted to the Supreme Court of the State of New York on April 27, 1961. The judgment of the Court of Appeals of the State of New York became the judgment of the Supreme Court of the State of New York by an order dated May 8, 1961, which was entered in the Office of the Clerk of the County of Erie on that date. The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1257 (3) [Since the petitioner has been deprived of her property without just compensation (*i.e.* due process of law)].

Questions Presented

1. Whether a citizen receives the due process of law guaranteed by the Fourteenth Amendment to the Federal Constitution when her land has been appropriated by a New York State Public Authority and, due to a mistake of fact or the fraud of an agent of the said Authority, acting within the scope of his employment, she is to receive only one-twentieth of its value as compensation.

2. Whether the sovereign immunity of New York State can insulate the New York State Thruway Authority from suit for rescission or reformation of a contract wherein

a citizen has been fraudulently deprived of her property without just compensation, while at the same time the Authority retains the benefits of that contract.

3. Whether the just compensation requirement embodied in the Due Process Clause of the Fourteenth Amendment overrides a state's immunity from suit so as to give state courts jurisdiction over an action by a defrauded citizen to rescind or reform a contract by which she is to be paid only one-twentieth of the value of her land which a State Public Authority had previously appropriated.

4. Whether the State of New York can, without violating the Due Process Clause of the Fourteenth Amendment, confer all the immunity from suit which it possesses on the New York Thruway Authority when the latter fraudulently deprives a citizen of just compensation after it has appropriated her land.

Constitutional Provision Involved

The Constitutional provision involved in this case is U. S. Const., Article XIV, Sec. 1, "* * * nor shall any state deprive any person of life, liberty, or property, without due process of law * * *."

Statement of Case

Petitioner owned certain property which the respondent appropriated for construction of a portion of the New York State Thruway. The appropriated land bisected the total tract of land owned by petitioner, and as a result of the appropriation, a major part of the remainder became inaccessible.

Subsequent to the appropriation and after much negotiation, petitioner and one William Hennessy, a proper agent of the respondent, agreed that the total compensation petitioner would receive would be $3,500.00, plus 90% of the value of the rear tract of petitioner's land which had been severed from the front tract, plus an added sum to compensate petitioner for the purchase of an access route to the said rear tract. Thereupon they entered into the agreement which petitioner seeks to rescind or reform.

Although that agreement sets forth only the sum of $3,500.00 and purports to be in full payment, the said Hennessy, at the time of its execution, specifically told petitioner that it was only for part of the compensation she would receive; this was in fact false and he knew it to be false at that time. The sum of $3,500.00 represents approximately one-twentieth of the total value of the land appropriated.

Subsequently, representatives of respondent repeated the misrepresentations of Hennessy, and the petitioner and her husband, being elderly people, relied upon these representations from the New York State Thruway Authority.

Petitioner was not advised of the true import of the said agreement until she contacted an attorney. Promptly thereafter, she brought the action in the Supreme Court of the State of New York to reform or rescind the contract. She has consistently refused to accept the $3,500.00 until the balance due her is also paid.

Respondent appeared specially and moved to dismiss the complaint on the ground that the respondent enjoys the same sovereign immunity as the State of New York

itself, and that such immunity bars an action of this nature. The Supreme Court of the State of New York accepted this theory and dismissed the complaint on the ground of lack of jurisdiction over the subject matter. The Appellate Division unanimously affirmed. The Court of Appeals of the State of New York, in a four to three decision, affirmed the judgment of the Appellate Division. Petitioner has no further avenue of appellate review in the state courts of New York.

The Federal Question

Respondent's motion to dismiss was opposed by petitioner in the trial court on several grounds, one of which was specifically entitled, "The denial of jurisdiction would constitute an unconstitutional deprivation of property without just compensation". This was reiterated by counsel for the petitioner in the Appellate Division and was again relied upon in the Court of Appeals. The arguments presented in all of petitioner's briefs and in the oral arguments of counsel specifically referred to the Due Process Clause of the Fourteenth Amendment to the United States Constitution and its extension of the Just Compensation Clause of the Fifth Amendment to the states. *Chicago, B. & Q. Ry. Co. v. Chicago*, 166 U. S. 226, 241.

Thus, the federal question was timely raised and preserved by petitioner at all levels of this case. This is shown beyond question in the Court of Appeals by reference to Point V of the Points of Counsel in the official report of that Court's decision at 9 N. Y. 2d 486, 488 (page 14, *infra*). Since the question was properly raised, the state court's failure to deal with it expressly was not for want of proper presentation. Furthermore, there was no other ground upon which a decision could have been ren-

dered which would avoid the federal question. Since the question was properly presented and its determination was necessary for the decision, the Court's failure to pass specifically upon the question is as reviewable as an express decision on the point and the Supreme Court can take jurisdiction over the case.

Reasons for Granting the Writ

1. The decision of the New York court in the instant case upholding the Authority's immunity from suit is in direct conflict with the decision of the United States Supreme Court in *Hopkins v. Clemson College*, 221 U. S. 636. The Court there held that the defendant college, as well as all other public corporations and political subdivisions, although agencies of the state, are not clothed with that immunity from suit which belongs to the state alone; and while they may be relieved from responsibility to a greater degree than individuals, they cannot rely on immunity as can the state. The decision of the New York Court of Appeals in the instant case is directly contradictory in that the Court held that, "There is no jurisdiction in any court of any suit against the Thruway Authority except as the Legislature has in terms created such jurisdiction". 9 N. Y. 2d 486, 489. Thus, just as the state court had done in *Clemson, supra*, the New York court interposed the immunity of the sovereign on behalf of a body, corporate and politic, created by the sovereign, when that body was sued for the violation of a constitutional right. The decision in *Clemson, supra*, points out the constitutional error in New York's approach in that it denies the basic constitutional guarantee of just compensation.

The mere fact that the enabling statute and the state court say that an agency is an instrumentality of the state exercising an essential government function is not decisive in giving it the protection of the Eleventh Amendment. *Lowes v. Pa. Turnpike Commission*, 125 F. Supp. 681.

> "The Eleventh Amendment was not intended to afford them [agents of the state] freedom from liability in any case where, under color of their office, they have injured one of the State's citizens * * *. The whole frame and scheme of the political institutions of this country, State and Federal, protest against extending to any agent the sovereign exemption from legal process." *Hopkins v. Clemson College*, 221 U. S. 636, 643.

2. Even if it were applicable to the Authority, a state's sovereign immunity should be overridden by the federal constitutional requirement of just compensation. It appears that the United States Supreme Court has never had to decide an express conflict between the sovereign immunity guaranteed by the Eleventh Amendment and the Just Compensation Clause of the Fifth Amendment which is included in the Due Process Clause of the Fourteenth Amendment. *Chicago, B. & Q. Ry. Co. v. Chicago*, 116 U. S. 226, 241. This issue has arisen in the highest courts of several states, however, and they have held that the constitutional requirement of just compensation will justify a judgment against the state even where sovereign immunity is expressly raised in defense. *Chick Springs Water Co., Inc. v. State Highway Dept.*, 159 S. C. 481, 157 S. E. 842; *State v. Stanley*, 188 Minn. 390, 247 N. W. 509; *Lehman v. Williams*, 301 Ky. 729, 193 S. W. 2d 161; *Anselmo v. Cox*, 135 Conn. 78, 60 A. 2d 767; *Rose v. State* (Cal.) 105 P. 2d 302. Although many of these cases involved a just compensation provision in their state

constitutions, the basic principles affecting just compensation should be the same whether it is guaranteed by the State or Federal Constitutions. Moreover, most based their decisions on the fact that the provision was self-executing and indeed the just compensation provision of the Federal Constitution has itself also been held to be self-executing. *Jacobs v. United States,* 290 U. S. 13.

As the Court held in the *Chick Springs* case,

> "* * * neither the commonwealth nor any of its political subdivisions, is liable in action *ex delicto* unless made liable by express enactments of the General Assembly *except where the acts complained of, in effect, constituted a taking of private property for public use without just compensation.* * * * [They are] liable when they take property, not on the ground that they are authorized by statute to be sued but because of the constitutional provision requiring compensation to be made for such taking. This protection is afforded to the humblest citizens by the Constitutions of the State and the United States and neither government can itself or by any statute or through any agency take property without paying compensation. Immunity from suit cannot avail in this instance. * * * To hold otherwise would be to say that the Constitution itself gives a right which the Legislature may deny by failing or refusing to provide a remedy. *Such a construction would indeed make the constitutional provision a hollow mockery instead of a safeguard for the rights of citizens.*" 159 S. C. 481, 497-98, 502; 157 S. E. 842, 848, 850. (Emphasis supplied.)

3. There is a conflict between the decisions of New York and several other states on the federal question of the inter-relation of the Eleventh and Fourteenth Amendments. This question has not as yet been passed upon by the United States Supreme Court. As pointed out previously, the decision in the instant case necessarily involved a determination that state immunity superseded

the Constitutional requirement of just compensation, whereas the highest courts in South Carolina, expressly, and Connecticut, California, Minnesota and Kentucky, impliedly, have all held to the contrary in the cases listed in Point 2.

4. The most significant and consequential development in government law in recent years has been the rapidly increasing creation of public authorities by governmental units. New York State alone has created over one hundred public authorities representing a multi-billion dollar operation. Legislative Document (1956) No. 46, *Staff Report on Public Authorities Under New York State*, P. 5. An important implement which the various governments have delegated to these authorities is the power of eminent domain since, to a large extent, they are all involved with the taking of private land for public use. New York State has conferred upon the respondent herein the right to acquire real property by appropriation. New York *Public Authorities Law*, Sec. 358. Under this method of taking real property, the land becomes the property of the Authority or other taking body immediately upon the filing of the appropriate maps. New York *Highway Law*, Sec. 347.

When this power is exercised, it is important that there be sufficient safeguards so that those landowners, who are being deprived in many cases of their most cherished possession, are afforded their Constitutional guarantee of "just compensation" for the land which is taken from them. If we are to permit these Authorities to procure land at an unfair price by whatever fraudulent or forceful methods their agents may use, and then allow them to hide behind the shield of state immunity when a landowner sues to receive his just due, the Constitutional guarantee of Just Compensation will become meaningless.

These governmental agencies have already taken enormous amounts of private land; in the future it can be expected they will take much more.

The New York appropriation statute provides a method whereby the person whose land has been taken may enter into an agreement as to the value of the land. New York *Highway Law*, Sec. 347. Under the decision in the Court below, this agreement stands regardless of the fraud or other unlawful means by which it may have been secured. It is apparent that many of those persons who will have their lands taken from them by the State will be elderly people such as the petitioner and her husband, or persons of lesser intelligence, or persons who would merely rely upon that degree of fairness which they would normally expect when dealing with their State or Federal Government. To protect such persons from being duped by the over-zealous or unscrupulous agent of the taking body, it is essential that immunity not exist in these cases. Otherwise the floodgates will be open to a rash of abuses whereby the lifesavings of an individual may be swept away "without any remedy". *Benz v. New York State Thruway Authority*, 9 N. Y. 2d 486, 490.

5. Fraud can never constitute due process of law, and compensation fraudulently determined is not just compensation. Petitioner has alleged fraud on the part of the respondent in the execution of the agreement wherein the compensation for her land was fixed and such allegation must be accepted as true for the purpose of this proceeding. *Locke v. Pembroke*, 280 N. Y. 430. Therefore, the application of the doctrine of sovereign immunity in the instant case renders the Constitutional guarantees of "Due Process" and "Just Compensation" meaningless.

To avoid such a result, it is essential that Certiorari be granted herein.

Conclusion

For the reasons stated above, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

MARIE BENZ,

Appellant,

v.

NEW YORK STATE THRUWAY AUTHORITY,

Respondent.

Argued March 1, 1961; decided April 27, 1961.

Courts — jurisdiction — Thruway Authority — Supreme Court has no jurisdiction of equitable action against New York State Thruway Authority for rescission or reformation of contract.

The Supreme Court has no jurisdiction of an equitable action against the New York State Thruway Authority for rescission or reformation of a contract for the sale of land to the Thruway Authority (*Easley v. New York State Thruway Auth.*, 1 N. Y. 2d 374, controlling).

Benz v. New York State Thruway Auth., 11 A. D. 2d 906, affirmed.

Points of Counsel

APPEAL, by permission of the Court of Appeals, from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department, entered July 29, 1960, unanimously affirming an order of the Supreme Court at Special Term (ALFRED M. KRAMER, J.), entered in Erie County, granting a motion by defendant to dismiss the complaint.

Lauren D. Rachlin for appellant. I. The State of New York has waived its immunity from actions in equity in section 8 of the Court of Claims Act. (*Psaty v. Duryea*, 306 N. Y. 413; *Bernardine v. City of New York*, 294 N. Y. 361; *Smith v. State of New York*, 227 N. Y. 405; *Breen v. Mortgage Comm.*, 285 N. Y. 425; *Glassman v. Glassman*, 309 N. Y. 436; *Strang v. State of New York*, 206 Misc. 734; *Pantess v. Saratoga Springs Auth.*, 255 App. Div. 426.) II. Even if the State has not waived its immunity from actions in equity, defendant is not immune from suit for recission and/or reformation of a contract. (*Easley v. New York State Thruway Auth.*, 1 N. Y. 2d 374; *Matter of Plumbing Assn. v. New York State Thruway Auth.*, 5 N. Y. 2d 420; *Bird v. New York State Thruway Auth.*, 8 A. D. 2d 495; *Keifer & Keifer v. R. F. C.*, 306 U. S. 381; *Sloan Shipyards v. United States Fleet Corp.*, 258 U. S. 549; *Lacock v. City of Schenectady*, 224 App. Div. 512; *United States v. Michel*, 282 U. S. 656; *Beldon v. Mortgage Comm.*, 173 Misc. 731; *Pantess v. Saratoga Springs Auth.*, 255 App. Div. 426; *MacMullen v. City of Middletown*, 187 N. Y. 37; *Osborn v. United States Bank*, 9 Wheat. [22 U. S.] 738; *United States v. Lee*, 106 U. S. 196.) III. Even if it were held that the doctrine of sovereign immunity applied to defendant, it still may not retain the benefits of a fraud committed by its agent in the performance of a ministerial act. (*People v. Kerr*, 27 N. Y. 188; *Wright v. Shanahan*, 61 Hun 264, 83 Hun 615, 149 N. Y. 495; *People v. Canal Bd.*, 55 N. Y. 390; *Weston v. City of Syracuse*, 158 N. Y. 274; *Sharp v. Mayor of City of N. Y.*, 40 Barb. 256; *Locke v. Pembroke*, 280 N. Y. 430; *Schwartz v. Lubin*, 6 A. D. 2d 108.) IV. The Thruway Authority may be likened to a municipal corporation acting in its corporate capacity. (*Matter of Brown v. Board of Trustees of Town of Hamptonburg*, 303 N. Y. 484; *New York City Tunnel Auth. v.*

Consolidated Edison Co., 295 N. Y. 467; *Moffett, Hodgkins & Co. v. Rochester*, 178 U. S. 373; *Abner M. Harper, Inc. v. City of Newburgh*, 159 App. Div. 695; *Martin v. Mayor of Brooklyn*, 1 Hill 545; *People v. Corporation of Albany*, 11 Wend. 539; *Van Dyke v. City of Utica*, 293 App. Div. 26; *Buck v. City of Lockport*, 6 Lans. 251; *Village of Elmira Hgts. v. Town of Horseheads*, 234 App. Div. 270; *Bloom v. Jewish Bd. of Guardians*, 286 N. Y. 349; *Bernardine v. City of New York*, 294 N. Y. 361.) V. The denial of jurisdiction would constitute an unconstitutional deprivation of property without just compensation. (*Locke v. Pembroke*, 280 N. Y. 430; *United States v. Lee*, 106 U. S. 196; *Chicago, B. & Q. R. R. Co. v. Chicago*, 166 U. S. 226; *Keifer & Keifer v. R. F. C.*, 306 U. S. 381.)

Louis J. Lefkowitz, Attorney-General (*Julius L. Sackman, Paxton Blair* and *James L. Magavern* of counsel), for respondent. I. The State has not waived its immunity from suits in equity. (*Stone v. State of New York*, 138 N. Y. 124; *Matter of Hoople*, 179 N. Y. 308; *Sanders v. Saxton*, 182 N. Y. 477; *Saranac Land & Timber Co. v. Roberts*, 195 N. Y. 303; *Niagara Falls Power Co. v. White*, 292 N. Y. 472; *Psaty v. Duryea*, 306 N. Y. 413; *People v. Canal Bd.*, 55 N. Y. 390; *Mathewson v. New York State Thruway Auth.*, 11 A. D. 2d 782; *Glassman v. Glassman*, 309 N. Y. 436; *Easley v. New York State Thruway Auth.*, 1 N. Y. 2d 374.) II. Respondent, as an instrumentality of the State engaged in an operation which is governmental in nature, is clothed with the sovereign's immunity except with respect to such causes as have been expressly statutorily allowed. No statutory waiver has been enacted which would permit maintenance of the instant cause of action. (*Matter of Plumbing Assn. v. New York State Thruway Auth.*, 5 N. Y. 2d 420; *Bird v. New York State*

Thruway Auth., 8 A. D. 2d 495; *New York City Tunnel Auth. v. Consolidated Edison Co.*, 295 N. Y. 467; *Pantess v. Saratoga Springs Auth.*, 255 App. Div. 426; *Strang v. State of New York*, 206 Misc. 734; *Bloom v. Jewish Bd. of Guardians*, 286 N. Y. 349; *Matter of Brown v. Board of Trustees of Town of Hamptonburg*, 303 N. Y. 484; *Holmes v. County of Erie*, 266 App. Div. 220, 291 N. Y. 798; *Lacock v. City of Schenectady*, 224 App. Div. 512, 251 N. Y. 575; *Wilcox v. City of Rochester*, 190 N. Y. 137; *Le Beau Piping Corp. v. City of New York*, 170 Misc. 644; *Glassman v. Glassman*, 309 N. Y. 436; *New Paltz, H. & P. T. Co. v. County of Ulster*, 202 App. Div. 234; *Voorhis v. Cornell Contr. Corp.*, 170 Misc. 908; *Neddo v. State of New York*, 194 Misc. 379, 275 App. Div. 492, 300 N. Y. 533.) III. The statutory power "to sue and be sued", conferred upon the New York State Thruway Authority, does not detract from its immunity as above set forth. (*Glassman v. Glassman*, 309 N. Y. 436; *Breen v. Mortgage Comm.*, 285 N. Y. 425; *Lacock v. City of Schenectady*, 224 App. Div. 512, 251 N. Y. 575; *Beldon v. Mortgage Comm.*, 173 Misc. 731; *Dietrich v. Palisades Interstate Park Comm.*, 114 Misc. 425; *The Onteora*, 298 F. 553; *Jackson v. State of New York*, 261 N. Y. 134.)

Opinion per Chief Judge Desmond

Chief Judge DESMOND. The courts below, bound as they were by *Easley v. New York State Thruway Auth.* (1 N. Y. 2d 374), correctly held that the Supreme Court has no jurisdiction of this equity suit (or of the equity suit of *Mathewson v. New York State Thruway Auth.*, 9 N. Y. 2d 788, decided herewith). *Easley* held that the Thruway Authority "is an arm or agency of the State" (p. 376) and that "the Legislature could in creating the Thruway

Authority have refused to waive immunity as to it and thus could have forbidden suits to be maintained against the Authority in any court or tribunal" (pp. 376-377). Easley's brief on his appeal to this court made (and we rejected) the identical arguments now made by appellant Benz. The *Easley* decision necessarily meant that there is no jurisdiction in any court of any suit against the Thruway Authority except as the Legislature has in terms created such jurisdiction.

There are just two statutory grants of jurisdiction to sue the Authority. One of them, section 361-b of the Public Authorities Law, discussed in *Easley* (*supra*), confers exclusive jurisdiction upon the Court of Claims to hear and determine all claims against the Authority for alleged torts or breaches of contract. That enactment certainly does not authorize the bringing of these suits in the Supreme Court. The only other statutory grant of jurisdiction to bring actions against the Authority is in subdivision 5 of section 368 of the Public Authorites Law whereby the Legislature in order to permit one particular type of equity suit against the Thruway Authority enacted a special statute therefor.

In the *Easley* opinion (*supra*) we described at length the peculiarly close relationship between the Authority and the State itself and we concluded that for purposes of suit the Thruway Authority was part of the State Government and, accordingly, not suable without a direct waiver of immunity. The reasons for that holding were exactly the same as in *Breen v. Mortgage Comm.* (285 N. Y. 425) and the reasons why the present suit cannot be maintained against the Authority are the same reasons explained by us in *Breen*. Section 8 of the Court of Claims Act did not, so we directly held in the *Breen* opinion, authorize a suit

by Breen in the Supreme Court and this situation was not affected by the statutory direction as to the Mortgage Commission that it may "sue and be sued". The same authorization as to the Thruway Authority (Public Authorities Law, § 354, subd. 1) has no broader meaning.

There may have been some doubt prior to 1954 (see dictum in *Strang v. State of New York*, 296 Misc. 734) as to jurisdiction of such suits as these but that doubt was removed by the legislative determination in 1954, before the Authority began to operate the Thruway, that there would be no jurisdiction of suits against the Authority except in the Court of Claims as to tort and contract claims and in the Supreme Court as to certain suits by bondholders (Public Authorities Law, §§ 354, 368). There is no provision anywhere for equity suits against the Thruway Authority. It would indeed be remarkable if the Legislature which "could have forbidden suits to be maintained against the Authority in any court or tribunal" produced a situation where suits at law could be prosecuted (per express enactment) in the Court of Claims only but (by legislative silence) equity suits would be allowed against the Thruway Authority in the Supreme Court. There is no sign that the lawmakers had any such strange intent.

This leaves plaintiff without any remedy by suit but "the immunity of a state agency is in no way affected by the lack of any other remedy" (*Glassman v. Glassman*, 309 N. Y. 436, 441; see *Psaty v. Duryea*, 306 N. Y. 413, 420).

The judgment should be affirmed, without costs.

Dissenting opinion per Van Voorhis, J.

VAN VOORHIS, J. (dissenting). This is an equitable action in the Supreme Court for rescission or reformation of a contract for the sale of land to the New York State Thruway Authority. The complaint alleges that due to mutual mistake or mistake of plaintiff induced by fraud of defendant's agent the purchase price in this contract amounted to approximately 1/20 of the agreed value of the appropriated land. The complaint has been dismissed on motion for lack of jurisdiction on the basis that the Thruway Authority enjoys governmental immunity from suits of this nature. The answer to this question requires examination of the doctrine of governmental immunity and of the decisions on the nature of the Thruway Authority as a public authority.

Section 8 of the Court of Claims Act was amended in 1939 so as to provide: "The state hereby waives its immunity from liability and action and hereby assumes liability and consents to have the same determined *in accordance with the same rules of law as applied to actions in the supreme court against individuals or corporations*, provided the claimant complies with the limitations of this article" (italics supplied). This section is held to constitute a waiver of the governmental immunity of all of the civil divisions of the State—counties, cities, towns, villages, and by the same token, public authorities (*Bernardine v. City of New York*, 294 N. Y. 361). In the *Bernardine* case this court said (p. 365): "The legal irresponsibility heretofore enjoyed by these governmental units was nothing more than an extension of the exemption from liability which the State possessed." Ironically this waiver is circumscribed in causes of action against the State itself, due to the circumstance that the State can be sued only in

the Court of Claims and section 9 of the Court of Claims Act has been held to be too narrow to cover jurisdiction over equitable actions (*Psaty v. Duryea*, 306 N. Y. 413). This does not alter the fact that all other governmental units in the State may be sued in the Supreme Court like individuals or private corporations (Court of Claims Act, § 8; *Bernardine v. City of New York, supra*). Waiver of governmental immunity is a consequence of the "rising tide of criticism against the doctrine of sovereign irresponsibility" (*Miller v. Town of Irondequoit*, 243 App. Div. 240, 241, per LEWIS, J., affd. 268 N. Y. 578). It is not the policy of the courts to restrict the waiver of immunity which has become so firmly a part of the public policy of the State.

Upon the creation of the New York State Thruway Authority in 1950 as "a body corporate and politic" (Public Authorities Law, § 352) with power "To sue and be sued" (Public Authorities Law, § 354, subd. 1), it could be sued in like manner as a private corporation in view of the waiver of immunity from liability ordained by section 8 of the Court of Claims Act expressly applying "to actions in the supreme court" (*Pantess v. Saratoga Springs Auth.*, 255 App. Div. 426). Indeed, until the adoption in 1954 of section 361-b of the Public Authorities Law, the Attorney-General's office successfully maintained that the Supreme Court had jurisdiction even of tort claims against the Thruway Authority to the exclusion of the jurisdiction of the Court of Claims (*Strang v. State of New York*, 206 Misc. 734).

In 1954 section 361-b was added to the Public Authorities Law purporting to confer upon the Court of Claims exclusive jurisdiction of claims against the Thruway Authority for its tortious acts and for breach of contract. The constitutionality of that section was tested in *Easley v.*

Thruway Auth. (1 N. Y. 2d 374) which was challenged in view of the section added in 1950 to the State Constitution providing that the Court of Claims shall have jurisdiction to hear and determine claims against the State (art. VI, § 23). There was held to be sufficient identity between the Thruway Authority and the State to give effect to section 361-b of the Public Authorities Law notwithstanding this provision in the State Constitution.

Nevertheless, it was recognized in *Matter of Plumbing Assn. v. New York State Thruway Auth.* (5 N. Y. 2d 420, 424) that the *Easley* decision does not mean that the Thruway Authority "'*is* the State'" (italics from original), but that it is a public corporation "independent and autonomous, deliberately designed to be able to function with a freedom and flexibility not permitted to an ordinary State board, department or commission." (p. 423). If there had been held to be the identity between the State and the Thruway Authority that is asserted on this appeal, the *Plumbing Association* case could not have been decided as it was.

Easley (*supra*) did not hold that actions against the Thruway Authority were forbidden to be maintained in the Supreme Court by section 9 of the Court of Claims Act, but only that causes of action in tort and for breach of contract were required to be prosecuted in the Court of Claims by section 361-b of the Public Authorities Law. Between 1950 and 1954, prior to the enactment of section 361-b, the Thruway Authority could, indeed, be sued only in the Supreme Court. Section 361-b of the Public Authorities Law does not purport (like Court of Claims Act, § 9) to provide that the Thruway Authority is immune from suit except in the Court of Claims. It simply directs, as stated

in its title, that exclusive jurisdiction "in certain suits against the authority" is conferred upon the Court of Claims. The Legislature deemed it advisable that claims against the Authority for tort or breach of contracts for construction, maintenance or operation should be decided in the Court of Claims, as they would be if they concerned ordinary State highways, but the Legislature was careful to state that exclusive jurisdiction in suits against the Authority was vested in the Court of Claims in those instances only. If the intention had been to confer exclusive jurisdiction on the Court of Claims in all instances, it would have been simple to have said so. The reason for the elaboration in the wording of this section is evidently to define the types of suits against the Authority which are cognizable solely by the Court of Claims, reserving jurisdiction in the Supreme Court over other causes of action within the general waiver of immunity expressly applicable to it (Court of Claims Act, § 8).

For these reasons, the order was erroneously granted dismissing the complaint on the ground that the Supreme Court has not jurisdiction of the subject of the action and the judgment entered thereon should be reversed.

Judges Dye, Froessel and Foster concur with Chief Judge Desmond; Judge Van Voorhis dissents in an opinion in which Judges Fuld and Burke concur.

Judgment affirmed.

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IN THE

Supreme Court of the United States

NO. 234—OCTOBER TERM, 1961

MARIE BENZ,

Petitioner,

against

NEW YORK STATE THRUWAY AUTHORITY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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IN THE

Supreme Court of the United States

No. 234—October Term, 1961

MARIE BENZ,

Petitioner,

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NEW YORK STATE THRUWAY AUTHORITY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

We oppose the granting of the petition because we maintain that the decision of the New York Court of Appeals (9 N. Y. 2d 486, 174 N. E. 2d 727) rests on a non-Federal ground adequate to support it, and because the alleged Federal question not only lacks substantiality but was not raised properly or in due time.

(1)

The decision in the Court below was based on the sovereign immunity of the State of New York to a suit in equity (*Psaty* v. *Duryea*, 306 N. Y. 413, 416-417, 118 N. E. 2d 584 [1954]) and the derivative immunity of the respondent as an instrumentality of the State engaged in a purely governmental function (*Easley* v. *New York State Thruway Authority*, 1 N. Y. 2d 374, 135 N. E. 2d 572 [1956]).

These are matters of State law, which are adequate to support the determination of the State courts and which

are not subject to review by this Court. This is implicit in the provisions of the Eleventh Amendment to the Federal Constitution.

A suit against a State by one of its own citizens, the State not having consented to be sued, is unknown to, and forbidden by, the law as much as suits against a State by citizens of another state of the Union or by citizens or subjects of foreign states (*Fitts* v. *McGhee*, 172 U. S. 524 [1899]; see also *Gunter* v. *Atlantic Coast Line R. Co.*, 200 U. S. 273 [1906]; *Georgia R. R. & Banking Co.* v. *Redwine*, 342 U. S. 299 [1952]).

When the alleged basis of waiver of the immunity recognized by the Eleventh Amendment is a state statute, as is the case here, the question to be answered is whether the state has intended to waive its immunity (*Petty* v. *Tennessee-Missouri Bridge Commission*, 359 U. S. 275, 278 [1959], revg. 254 F. 2d 857 [8th Cir., 1958]). The best and only competent Court which may answer this question is the state Court. This Court accepts the state Court's interpretation of state law (*Demorest* v. *City Bank Farmers Trust Co.*, 321 U. S. 36, 49 [1944]; *Chicago, etc., R. Co.* v. *Risty*, 276 U. S. 567, 570 [1928]; *Quong Ham Wah Co.* v. *Industrial Commission*, 255 U. S. 445, 448 [1921]).

We have not yet reached the stage where it can properly be asserted that the Fourteenth Amendment of the Federal Constitution has resulted in the repeal of the Eleventh Amendment. Since the non-Federal ground (sovereign immunity) was the basis of the adjudication by the Court of Appeals and since, as demonstrated, it is an adequate basis for the adjudication, this Court should deny the petitioner's request for review (*Wood* v. *Chesborough*, 228 U. S. 672, 676-680 [1913]; *West Chicago St. R. Co.* v. *Illinois ex rel. Chicago*, 201 U. S. 506, 519-520 [1906];

Chicago, B. & Q. R. Co. v. *Illinois ex rel. Comrs.*, 200 U. S. 561, 580-581 [1906]).

(2)

It is clear also that the alleged Federal question lacks substantiality. The petitioner seeks to reform or rescind an agreement of adjustment under which the respondent agreed to compensate her for the taking of part of her land under the power of eminent domain. The agreement was entered into in lieu of a judgment of the State Court of Claims (which would have ensued upon the prosecution of a claim in that Court) and was entered into pursuant to statutory authorization.

The essence of the petitioner's complaint is that she agreed to accept a wholly inadequate sum as compensation for her claim. But the substantiality of her claim of violation of due process under the Federal Constitution is no greater in the case of an agreement than it would be in the case of an award. This Court has held that as long as compensation is made or provided for, the determination of the amount of the compensation does not present any substantial Federal question (*Appleby* v. *Buffalo*, 221 U. S. 524, 531-533 [1911]).

(3)

It is equally clear from the record that the Federal question, if any, was neither properly raised nor raised in due time.

This is not an action to recover damages by reason of an uncompensated taking in eminent domain. The action is one to rescind or reform an agreement. It is true that the predicate for the agreement was an appropriation of the lands of the petitioner, but the taking, as such, is not the subject of the instant cause of action.

In the Supreme Court, Erie County, the Court of first instance, the only questions presented to and passed upon by the Court were the questions of sovereign immunity of the State and the derivative immunity of the respondent as an instrumentality of the State engaged in a purely governmental function to an action in equity. The Court of first instance held adversely to the petitioner upon both questions. No constitutional question was raised by the petitioner, nor was such question considered by the Court.

Upon appeal to the Appellate Division of the Supreme Court, the same questions were presented; the latter Court affirmed the lower Court without opinion.

Thereafter, on appeal to the Court of Appeals, the petitioner for the first time raised the point that "The denial of jurisdiction would constitute an unconstitutional deprivation of property without just compensation."

It is a requisite of the jurisdiction of the Court of Appeals to review a constitutional question that it shall have been properly raised for decision in the courts below. (*Delaney* v. *Brett*, 51 N. Y. 78 [1872]; *Purdy* v. *Erie R. R. Co.*, 162 N. Y. 42, 56 N. E. 508 [1900], dism. 185 U. S. 148 [1902]; *Matter of Andersen*, 178 N. Y. 416, 70 N. E. 921 [1904]; *Nod-Away Co.* v. *Carroll*, 240 N. Y. 252, 148 N. E. 512 [1925]; *Matter of Yeannelis* v. *Menides*, 259 N. Y. 513, 182 N. E. 159 [1932]; *City of New Rochelle* v. *Closter*, 296 N. Y. 506, 68 N. E. 2d 451 [1946]; *Matter of O'Neil* v. *Board of Regents*, 298 N. Y. 777, 83 N. E. 2d 469 [1948]; *Rector, etc., of Church of Holy Trinity* v. *Melish*, 301 N. Y. 679, 95 N. E. 2d 43 [1950]). Accordingly, neither the prevailing nor the dissenting opinions of the Court of Appeals in the case at bar gave even the slightest consideration to the belatedly raised constitutional question. Both are concerned only with the question of the status of the re

spondent as a governmental instrumentality of the State and the question of immunity to the suit at bar.

Under circumstances such as these, this Court has refused to review the determination of a lower court and has consistently dismissed writs of error or appeals. (See *Hulbert* v. *Chicago*, 202 U. S. 275 [1906]; *Brown* v. *Massachusetts*, 144 U. S. 573, 580 [1892]; *Edelman* v. *California*, 344 U. S. 357 [1953]; *Erie R. Co.* v. *Purdy*, 185 U. S. 148 [1902]; *Mutual Life Ins. Co.* v. *McGrew*, 188 U. S. 291, 309 [1903].) Where, as in the *McGrew* case, *supra*, and as in the case at bar, the highest State court is completely silent on the Federal question, it has been assumed by this Court, in the absence of affirmative evidence in the record to the contrary, that the silence was due to procedural deficiency (*Bailey* v. *Anderson*, 326 U. S. 203, 206-207 [1945]).

This Court has stated that it undoubtedly rests with each state to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and that state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law (*John* v. *Paullin*, 231 U. S. 583, 585 [1913]).

Incidentally, it affirmatively appears from the record herein that the Federal question has never been properly raised—even in the Court of Appeals. The petitioner has sought to supply this deficiency by adding Appendix A to her brief herein. Therein she supplies a copy of the report at 9 N. Y. 2d 486, which includes an outline of the points which counsel for the petitioner made in his brief. It is only here that it appears that an *attempt* was made to raise the Federal question. But this Court has held that briefs and oral arguments before state courts are not part

of the record filed with this Court and cannot be used to establish the fact that a Federal question was raised (*Live Oak Water Users' Association* v. *Railroad Commission*, 269 U. S. 354, 357-358 [1926]; *Lynch* v. *New York ex rel. Pierson*, 293 U. S. 52, 54 [1934]).

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: Albany, New York, August 7, 1961.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1961

No. 234

MARIE BENZ, 320 East Main Street,
Hamburg, New York,

Petitioner,

vs.

NEW YORK STATE THRUWAY AUTHORITY,
119 Washington Avenue, Albany, New York,

Respondent.

SUPPLEMENTARY REPLY BRIEF

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IN THE

Supreme Court of the United States

October Term, 1961

No. 234

MARIE BENZ, 320 East Main Street, Hamburg, New York,
Petitioner,

vs.

NEW YORK STATE THRUWAY AUTHORITY, 119 Washington Avenue, Albany, New York,
Respondent.

SUPPLEMENTARY REPLY BRIEF

Petitioner in support of her prayer for the issuance of a writ of certiorari makes the following supplementary points in reply to respondent's opposition brief.

(1)

The respondent contends that the decision in the Court below was based on sovereign immunity and as such is a non-federal ground which is adequate for a denial of petitioner's application. Such an argument begs the question which is presented upon this application for certiorari. In the presence of a violation of the Fourteenth Amendment (and the allegations of fraud set forth in petitioner's complaint, which must be taken as true for all purposes

of this proceeding, constitute such a violation) the question is whether the doctrine of sovereign immunity or the federally guaranteed right of just compensation is superior. Thus, any holding in favor of the former must necessarily include a decision against the latter. Therefore, the Court of Appeals could not have decided this question without at the same time passing upon the federal question by implication. Where the non-federal ground is so interwoven with the federal ground as not to be an independent matter, the jurisdiction of the Supreme Court is plain. *Enterprise Irrigation District v. Farmers Mutual Canal Co.*, 243 U. S. 157.

(2)

The opposition brief, in point (2) claims that a private agreement as to compensation is equivalent to a court determination of the same and then cites *Appleby v. Buffalo*, 221 U. S. 524, 531-533, 1911 to support a statement that as long as any provision is made for compensation, no matter how small the amount may be, no substantial federal right can be violated and hence no substantial federal question is raised.

Although a valid agreement might be the same as a court judgment, petitioner contends that there was no valid agreement, but only a fraudulently induced, and therefore invalid, one.

Moreover, in the *Appleby* case, *supra*, the New York Court of Appeals had expressly considered the facts of the case and determined that the owner was not entitled to more than the nominal damages that had been awarded by a board of commissioners. Since credible evidence to that effect had been introduced (unlike the instant case),

the Court held that the petitioner had received a proper hearing during which he excepted to no errors of law and therefore he could not complain that his compensation was not just. This is far different from saying that any compensation is "just" compensation. The distinction between that case and the instant one is transparent. There has been no claim or evidence that the value of petitioner's land is as low as the amount specified in the contract. In fact, since this appeal arises out of a motion to dismiss, it must be conceded that its value was the amount alleged, *viz.* twenty times the amount in the contract. Considering this point and the lack of any review of the amount in the contract, the inapplicability of *Appleby, supra*, becomes evident.

(3)

Petitioner has properly raised and preserved the Constitutional question since the commencement of the case. Respondent, on page 4 of its opposition brief, contends that the federal question was never raised in the New York Supreme Court nor in the Appellate Division. Thereafter it goes on to add that, "* * * on appeal to the Court of Appeals, the petitioner for the first time raised the point that 'The denial of jurisdiction would constitute an unconstitutional deprivation of property without just compensation.' "

That these are patent misstatements of the true facts is easily shown. Relevant excerpts from petitioner's brief in the Court of first instance and her brief in the Appellate Division, copies of which are and have been in respondent's possession, clearly indicate that petitioner has relied on the Constitutional argument since the inception of the case. These excerpts are attached hereto as Appendices A and B.

Furthermore, the respondent's own Reply Memorandum in the Court of first instance contained as its Point VI, "PLAINTIFF'S ARGUMENT THAT DENIAL OF JURISDICTION WOULD CONSTITUTE AN UNCONSTITUTIONAL DEPRIVATION OF PROPERTY IS WITHOUT MERIT." Therefore, respondent's claim on this point is utterly groundless and without any basis in fact.

Respondent goes on to add that briefs and oral arguments are not acceptable to show the federal question since only the record can be considered. What respondent overlooks is that this action never reached the trial stage and thus there can be no record (of proceedings) as such. Rather it has proceeded through the appellate levels as a result of the granting of a motion to dismiss made after the summons and complaint were served. All court proceedings, therefore, have been by way of brief and oral argument. Petitioner raised the federal question in the only way open to her, *viz.* by raising the point in her answering brief in opposition to the respondent's motion to dismiss in the Court of first instance.

Therefore, petitioner has supplied the Court with a copy of the official report of this case at 9 N. Y. 2d 486 (as Appendix A of her original Petition for Certiorari) which lists the Constitutional argument as one of the points which petitioner raised in the Court of Appeals. Petitioner also submits excerpts from her briefs in all the other Courts, as Appendices A and B hereof, to show that the point was also raised in the Court of first instance and the Appellate Division respectively. The cases cited by respondent which hold that briefs and oral arguments may not be considered all reached the trial stage and contain records of the full trial proceedings. There were no such proceedings in this case.

As stated in petitioner's original petition, the lack of reference in the state Court's decision to the federal question does not prevent it from being considered by this Court if it was properly raised and if the decision there necessarily, even though not expressly, involved an adverse determination of the point. A motion to amend the remittitur to show that the federal question was raised and necessarily passed upon, has been made in the Court of Appeals by the petitioner and is presently pending in that Court. Regardless of any action taken by the New York Court of Appeals, however, the United States Supreme Court has the power to assert jurisdiction in this case. *Rogers v. Alabama*, 192 U. S. 226, 230-1.

CONCLUSION

For the reasons stated above and in the original petition, a writ of certiorari should be granted.

Dated: Buffalo, New York, September 1, 1961.

Respectfully submitted,

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Counsel for Petitioner,
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APPENDIX A

Excerpt From Petitioner's Brief in Special Term of Supreme Court, Erie County

POINT IV

The denial of jurisdiction would constitute an unconstitutional deprivation of property without just compensation.

The plaintiff has alleged in her complaint, which must be taken as true for the purposes of this motion, that the contract as entered into between the plaintiff and the defendant is not the contract which was agreed upon by them, and that the price stated in the agreement is one-twentieth of the true value. *Locke v. Pembroke, supra*, page 6.

The plaintiff, by reason of the fraud of the defendant or the mutual mistake of plaintiff and defendant, is now barred from receiving just compensation for her property. It is the very essence of the equitable jurisdiction of the courts to rectify this situation. If the court fails to act, the plaintiff has no remedy. As the Supreme Court stated in *United States v. Lee, supra*, page 8, referring to the Fifth Amendment, at page 181:

> "If this constitutional provision is a sufficient authority for the court to interfere to rescue a prisoner from the hands of those holding him under the asserted authority of the government, which reason is there that the same courts shall not give remedy to the citizen whose property has been seized without due process of law and devoted to public use without just compensation?"

This applies to the States by virtue of the Fourteenth Amendment.

APPENDIX B

Excerpt From Petitioner's Brief in the Appellate Division

POINT IV

The denial of jurisdiction would constitute an unconstitutional deprivation of property without just compensation.

The plaintiff has alleged in her complaint, which must be taken as true for the purposes of this motion, that the contract as entered into between the plaintiff and the defendant is not the contract which was agreed upon by them, and that the price stated in the agreement is one-twentieth of the true value. *Locke v. Pembroke*, 280 N. Y. 430.

The plaintiff, by reason of the fraud of the defendant or the mutual mistake of plaintiff and defendant, is now barred from receiving just compensation for her property. It is the very essence of the equitable jurisdiction of the courts to rectify this situation. If the court fails to act, the plaintiff has no remedy. As the Supreme Court stated in *United States v. Lee*, 106 U. S. 196, 218, referring to the Fifth Amendment:

> "If this constitutional provision is a sufficient authority for the court to interfere to rescue a prisoner from the hand of those holding him under the asserted authority of the government, what reason is there that the same courts shall not give remedy to the citizen whose property has been seized without due process of law and devoted to public use without just compensation?"

This applies to the States by virtue of the Fourteenth Amendment. *Chicago B. & Q. R. Co. v. Chicago*, 166 U. S. 266, 241. * * *

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IN THE

Supreme Court of the United States

October Term, 1961

No. 234

MARIE BENZ,
Petitioner,

vs.

NEW YORK STATE THRUWAY AUTHORITY,
Respondent

BRIEF FOR THE PETITIONER

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on the Brief.

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IN THE

Supreme Court of the United States

October Term, 1961

No. 234

MARIE BENZ,

Petitioner,

vs.

NEW YORK STATE THRUWAY AUTHORITY,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Opinions Below

The memorandum opinion of the Supreme Court of the State of New York is unreported (R. 5-11). The memorandum of the Appellate Division of the Supreme Court is reported at 11 App. Div. 2d 906, 205 N. Y. S. 2d 1004 (R. 28).

The majority and dissenting opinions of the Court of Appeals of the State of New York are reported at 9 N. Y. 2d 486, 215 N. Y. S. 2d 47, 174 N. E. 2d 727 (R. 32-37).

Jurisdiction

The judgment of the Court of Appeals of the State of New York was made and remitted to the Supreme Court of the State of New York on April 27, 1961 (R. 37). The judgment of the Court of Appeals of the State of New York became the judgment of the Supreme Court of the State of New York by an order dated May 8, 1961, which was entered in the Office of the Clerk of the County of Erie on that date. An order amending the Remittitur was granted on October 5, 1961 (R. 38). The petition for a writ of certiorari was filed July 17, 1961 and was granted October 23, 1961 (R. 41). The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1257 (3) [Since the petitioner has been deprived of her property without just compensation (*i.e.* due process of law)].

Constitutional Provisions and Statutes Involved

The Constitutional provisions involved in this case is U. S. Const., Article XIV, Sec. 1, "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law * * *."

Article 1, Sec. 7 (a), and Article VI, Sec. 1 of the New York State Constitution, the Fifth and Eleventh Amendments, to the United States Constitution, Section 347, Subdivisions 5 and 5-a of the New York Highway Law and Sections 352 and 358 of the New York Public Authorities Law are also involved and the pertinent text is set forth in Appendix A, *infra*.

Questions Presented

1. Whether a citizen receives the due process of law guaranteed by the Fourteenth Amendment to the Federal

Constitution when her land has been appropriated by a New York State Public Authority and, due to a mistake of fact or the fraud of an agent of the said Authority, acting within the scope of his employment, she is to receive only one-twentieth of its value as compensation.

2. Whether the just compensation requirement embodied in the Due Process Clause of the Fourteenth Amendment overrides a state's immunity from suit so as to give state courts jurisdiction over an action by a defrauded citizen to rescind or reform a contract by which she is to be paid only one-twentieth of the value of her land which a State Public Authority had previously appropriated.

3. Whether the sovereign immunity of New York State can insulate the New York State Thruway Authority from suit for rescission or reformation of a contract wherein a citizen has been fraudulently deprived of her property without just compensation, while at the same time the Authority retains the benefits of that contract.

4. Whether the State of New York can, without violating the Due Process Clause of the Fourteenth Amendment, confer all the immunity from suit which it possesses on the New York Thruway Authority when the latter fraudulently deprives a citizen of just compensation after it has appropriated her land.

Statement of the Case

Petitioner owned certain property which the respondent appropriated for construction of a portion of the New York State Thruway. The appropriated land bisected the total tract of land owned by petitioner, and, as a result of the appropriation, a major part of the remainder became inaccessible (R. 13).

Subsequent to the appropriation and after much negotiation, petitioner and one William Hennessy, a proper agent of the respondent, agreed that the total compensation petitioner would receive would be $3,500.00 plus 90% of the value of the rear tract of petitioner's land which had been severed from the front tract, plus an added sum to compensate petitioner for the purchase of an access route to the said rear tract (R. 13). Thereupon they entered into the agreement which petitioner seeks to rescind or reform (R. 12).

Although that agreement sets forth only the sum of $3,500.00 and purports to be in full payment, the said Hennessy, at the time of its execution, specifically told petitioner that it was for only part of the compensation she would receive; this was in fact false and he knew it to be false at that time (R. 15). The sum of $3,500.00 represents approximately one-twentieth of the total value of the land appropriated (R. 14).

Subsequently, representatives of respondent repeated the misrepresentations of Hennessy, and the petitioner and her husband, being elderly people, relied upon these representations from the New York State Thruway Authority (R. 14).

Petitioner was not advised of the true import of the said agreement until she contacted an attorney (R. 15). Promptly thereafter, she brought the action in the Supreme Court of the State of New York to reform or rescind the contract. She has consistently refused to accept the $3,500.00 until the balance due her is also paid.

Respondent appeared specially and moved to dismiss the complaint on the ground that the respondent enjoys the same sovereign immunity as the State of New York itself, and that such immunity bars an action of this na-

ture. The Supreme Court of the State of New York accepted this theory and dismissed the complaint on the ground of lack of jurisdiction over the subject matter (R. 5). The Appellate Division unanimously affirmed. The Court of Appeals of the State of New York, in a four to three decision, affirmed the judgment of the Appellate Division (R. 32).

In an order amending the Remittitur (R. 38), the Court stated that upon the appeal before that Court there was presented and necessarily passed upon a question under the Constitution of the United States, *viz.* "Whether plaintiff was deprived of just compensation in violation of the due process clause of the Fourteenth Amendment. The Court of Appeals held there was no such deprivation or violation."

The Supreme Court of the United States granted certiorari (R. 41).

Summary of Argument

It is the contention of the petitioner that once having had her land taken from her by the exercise of the power of eminent domain by the respondent, the duty then fell upon the respondent to pay to the petitioner "just compensation" for the property taken. This right of just compensation is constitutionally guaranteed to the petitioner by the Fourteenth Amendment.

The agreement fixing the petitioner's compensation for the land taken was fraudulently arrived at and thus does not give her the "just compensation" to which she is entitled. The State of New York holds that there is no remedy for the petitioner in this situation for the reason that the respondent is immune from legal action. Thus this

immunity, conflicting as it does with the constitutionally guaranteed right of "just compensation", must fall.

Petitioner claims, furthermore, that the state cannot constitutionally delegate its immunity to a Public Authority for such delegation would in fact result in the Public Authority having more immunity that the state itself; for in the last analysis, the state is responsible to the people, whereas a public corporation is directly responsible to no-one.

Petitioner further argues that even if the respondent did have the immunity of the sovereign, such immunity does not bar an action against a Public Authority for the deprivation of a constitutionally guaranteed right.

ARGUMENT

I

The Fourteenth Amendment to the Federal Constitution guarantees to the petitioner that she will receive just compensation for the property which has been taken from her.

A.

JUST COMPENSATION IS GUARANTEED TO A PERSON WHEN HIS LAND IS TAKEN.

Whenever a person's land is taken by the Federal Government under its power of eminent domain, the Fifth Amendment guarantees him that he will receive just compensation for the taking. The Due Process clause of the Fourteenth Amendment extends this guarantee to situations wherein land is taken by a state government.

Chicago, B. & Q. Ry. Co. v. Chicago, 166 U. S. 226, 17 S. Ct. 581, 41 L. Ed. 979 (1897). The compensation is to be the equivalent of the owner's loss rather than the taker's gain. "Such compensation means the full and perfect equivalent in money of the property taken. The owner is to be put in as good a position pecuniarily as he would have occupied if his property had not been taken." *U. S. v. Miller*, 317 U. S. 369, 373, 63 S. Ct. 276, 87 L. Ed. 336 reh. gr. 318 U. S. 798, 63 S. Ct. 557, 87 L. Ed. 1162 (1942); *U. S. ex rel. T. V. A. v. Powelson*, 319 U. S. 266, 281, 63 S. Ct. 1047, 87 L. Ed. 1390 (1933).

> "The noun 'compensation' standing by itself, carries the idea of an equivalent * * *. So that if the adjective 'just' had been omitted, and the provision was simply that property should not be taken without compensation, the natural import of the language would be that the compensation should be the equivalent of the property. And this is made emphatic by the adjective 'just'. There can, in view of the combination of those two words, be no doubt that the *COMPENSATION MUST BE A FULL AND PERFECT EQUIVALENT FOR THE PROPERTY TAKEN.*" (Emphasis supplied.) *Monongahela Navigation Co. v. U. S.*, 148 U. S. 312, 326, 13 S. Ct. 622, 37 L. Ed. 463 (1893).

So also in *United States v. Commodities Trading Corp.*, 339 U. S. 121, 124, 70 S. Ct. 547, 94 L. Ed. 707 (1950), the Court said that "the word 'just' in the Fifth Amendment evokes ideas of 'fairness' and 'equity' ". Naturally, if a state itself must pay just compensation when it takes land, *a fortiori*, an agency of the state to which it has delegated its power of eminent domain is likewise required to pay just compensation when it takes private land.

When payment is not made until after the taking occurred, just compensation must include not only the value at the time of taking but also an amount sufficient to

produce the full equivalent of that value paid contemporaneously with the taking and interest is usually an accurate measure of that amount. *U. S. v. Klamath Indians*, 304 U. S. 119, 123, 58 S. Ct. 799, 82 L. Ed. 1219 (1938); *Jacobs v. U. S.*, 290 U. S. 13, 16-17, 54 S. Ct. 26, 78 L. Ed. 142 (1933).

B.

JUST COMPENSATION SHOULD OVERRIDE SOVEREIGN IMMUNITY.

The Eleventh Amendment to the Federal Constitution reads:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

This amendment has been construed to extend to suits against a state in federal courts by citizens of the same state, *Hans v. State of Louisana*, 134 U. S. 1, 10 S. Ct. 504, 33 L. Ed. 842 (1889), and indeed a notion of the sovereign immunity of states is found in state constitutions and pervades in state courts.

Strictly construed, such a notion would seem to render nugatory the just compensation guarantee of the Fourteenth Amendment, for in order for a person to receive his just due, it is oftentimes necessary to sue the sovereign. An express conflict between these two, however, has never had to be resolved in the federal courts.

Yet several state courts have had occasion to consider this problem. Admittedly many, though not all, of these cases have dealt with a guarantee of just compensation

as found in their State Constitution rather than in the Federal Constitution. Whether such a provision is found in a State or Federal Constitution, however, the essential theory behind it remains the same and the reasoning applicable to one should be equally as cogent when applied to the other.

The succinct reasoning of the Court in *Chick Springs Water Co. Inc. v. State Highway Dept.*, 159 S. C. 481, 497-98, 502, 157 S. E. 842, 848, 850 (1930) is directly in point:

> "* * * neither the commonwealth nor any of its political subdivisions, is liable in action *ex delicto* unless made liable by express enactments of the General Assembly *EXCEPT WHERE THE ACTS COMPLAINED OF, IN EFFECT, CONSTITUTED A TAKING OF PRIVATE PROPERTY FOR PUBLIC USE WITHOUT JUST COMPENSATION.* * * * [They] are held liable where they take property, not upon the ground that they are authorized by statute to be sued, but because of the constitutional provision requiring compensation to be made for such taking. This protection is afforded to the humblest citizen by the Constitutions of the State and the United States and neither government can itself or by any statute or through any agency take property without paying compensation. 'Immunity from suit' cannot avail in this instance. * * * To hold otherwise would be to say that the Constitution itself gives a right which the Legislature may deny by failing or refusing to provide a remedy. *SUCH A CONSTRUCTION WOULD INDEED MAKE THE CONSTITUTIONAL PROVISION A HOLLOW MOCKERY INSTEAD OF A SAFEGUARD FOR THE RIGHTS OF CITIZENS.*" (Emphasis supplied.)

Thus, this case specifically held that the just compensation provisions of the State *and Federal* Constitutions are an exception to the notion of a sovereign immunity *as A matter of constitutional right;* therefore, this was not based

on merely the procedural requirements of the state involved.

Many other states have supported this reasoning in opinions by their highest courts. Louisiana has held that because of the just compensation provision of their constitution, any agency of the state which has taken or damaged private property for public use without paying adequate compensation can be sued for such irrespective of the non-existence of a legislative authorization for the suit. *Cope v. La. State Live Stock Sanitary Board*, (La.), 176 So. 657 (1937). Connecticut has found that its constitutional provision for just compensation allows suit, and no other specific permission to sue is necessary when the state takes property. *Anselmo v. Cox*, 135 Conn. 78, 60 A. 2d 767 (1948). Likewise, California has found its just compensation provision to be a restriction upon the state itself which is self-executing, and legislative inaction does not allow the state to violate it. *Rose v. State* (Cal.), 105 P. 2d 302 (1940). In accord with these States, Oregon agrees that the property holder whose constitutional rights have been injured has a common law remedy in the absence of a statute. *Thomasek v. State*, 196 Ore. 120, 248 P. 2d 703 (1952). For further support of this argument see also *Renninger v. State* (Ida.), 213 P. 2d 911 (1950); *Lehman v. Williams*, 301 Ky. 729, 193 S. W. 2d 161 (1946); *cf. State v. Stanley*, 188 Minn. 390, 247 N. W. 509 (1933).

Many of these cases based their conclusions on the fact that the state constitutional provision of just compensation was self-executing, *i.e.* there is a manifest intention that the provision should go into immediate effect so that no ancillary legislation is necessary to the enjoyment of the right given and the enforcement of the duty imposed.

12 *Corpus Juris* 732. Since it was decided in *Jacobs v. U. S.*, 290 U. S. 13, 54 S. Ct. 26, 78 L. Ed. 142 (1933) that the same provision in the Federal Constitution was also self-executing, a similar result should obtain in the instant suit and override any claim of sovereign immunity.

Indeed as Connecticut has held in *Anselmo v. Cox, supra*, p. 10, the provision for just compensation found in a constitution should be construed to be equivalent to an implied, or probably even an express, waiver of immunity or a consent to be sued.

Though ordinarily a state cannot be sued without its consent, an exception exists in actions against the state for compensation for property taken in that the constitutional provision for just compensation itself gives consent for the state to be sued and in such cases, no act of the Legislature is necessary to enjoy the right, nor can they by any act deny it. *Chick Springs Water Co. Inc. v. State Highway Dept., supra*, p. 9.

It is interesting to note that Article I, Section 7(a) of the New York State Constitution provides specifically that, "Private property shall not be taken for public use without just compensation".

If petitioner in the instant case had failed or refused to reach an agreement with the agent for the Authority as to the value to be paid her for her land, she would have had her day in court in a condemnation proceeding during which she would, in effect be suing the state. Here, however, because petitioner was willing to make an amicable agreement without requiring the Authority to go to court, she now finds, when the agreement turns out to be fraudulent rather than friendly, that she is in far worse position than she would have been if she had been unwill-

ing to settle her claim amicably. Indeed, as the New York Court of Appeals said in her case, she is "without any remedy". *Benz v. New York State Thruway Authority*, 9 N. Y. 2d 486, 490, 215 N. Y. S. 2d 47, 174 N. E. 2d 727 (1961). The objectionable inequity of this situation and its complete repugnance to the constitutional guarantee of "just compensation" is evident.

Actually, suits against the sovereign without any consent on its part have often been allowed under one guise or another. *The Siren*, 74 U. S. 152, 7 Wall 152, 19 L. Ed. 129 (1868), and *The Davis*, 77 U. S. 15, 10 Wall 15, 19 L. Ed. 875 (1869), both held that property of the United States can be subjected to maritime liens where such can be done without technically making the United States a party. In *Meigs v. McClung's Lessee*, 13 U. S. 11, 9 Cranch 11, 3 L. Ed. 639 (1815), and in *Wilcox v. Jackson, ex dem. McConnel*, 38 U. S. 498, 13 Pet. 498, 10 L. Ed. 264 (1839), the petitioner, who had been deprived of his property without just compensation, sued not for such relief as petitioner does here, but rather for the more extreme remedy of ejectment of the United States officials that were on his land. In both cases he was successful even though the use the land was being put to was as a military fort.

Another suit which is at least, in effect, directly against the sovereign is the use of the writ of *habeas corpus*—

> "The instances in which the life and liberty of the citizen have been protected by the judicial writ of *habeas corpus* are too familiar to need citation, and many of these cases, indeed almost all of them, are those in which life or liberty was invaded by persons assuming to act under the authority of the government • • •
>
> If this constitutional provision (Due Process) is a sufficient authority for the court to interfere to rescue a prisoner from the hands of those holding him under

> the asserted authority of the Government, what reason is there that the same courts shall not give remedy to the citizen whose property has been seized without due process of law and devoted to public use without just compensation?" *United States v. Lee*, 106 U. S. 196, 218, 1 S. Ct. 240, 27 L. Ed. 171, 181 (1882).

Just as no consent is necessary to institute a writ of *habeas corpus* so also none should be necessary to sue for just compensation; or if it is necessary, it should be held to be supplied by the guarantee of just compensation. Any other interpretation would render the guarantee worthless.

It may be argued that petitioner has a remedy, *viz.* to personally sue the agent of the Thruway who committed the fraud. But when relatively large sums of money are involved, as in the instant case, to so limit the petitioner is to render her chances of recovery virtually impotent. It is not the individual agent who benefited by his fraudulent acts—it is the Thruway Authority. They have in effect ratified his actions by their continued possession of the land involved and their refusal to pay petitioner more than one-twentieth of the value of her land. Only by granting plaintiff the relief which she seeks in this action can "just compensation" be meaningful; it is not meaningful when it is the equivalent of an unsatisfiable judgment against a state employee of limited assets. To require petitioner to garnishee his wages for life was obviously not the intent of the framers of the Fourteenth Amendment.

This is a suit for rescission or reformation of the complaint even though it also contains an omnibus relief clause under which damages can be awarded (R. 16). Naturally, a suit against the agent would not avail to correct the defective agreement The Court of Appeals has made it clear that having once signed this agreement, regardless of the fraud or undue influence used, the plaintiff is "with-

out any remedy". *Benz v. New York State Thruway, supra*, p. 12. New York makes no provision to protect the rights of its citizens in this situation.

It is therefore necessary that the federal courts offer this protection in regard to the rights guaranteed by the Fourteenth Amendment. Just as the power of eminent domain is limited by the requirement of "just compensation", *Hanson Lumber Co. v. U. S.*, 261 U. S. 581, 43 S. Ct. 442, 67 L. Ed. 809 (1923), so also should be the "power" of sovereign immunity. *Home Telephone & Telegraph Co. v. City of Los Angeles*, 227 U. S. 278, 33 S. Ct. 312, 57 L. Ed. 510 (1913) makes it clear that the reach of the Fourteenth Amendment is coextensive with *any* exercise by a state of power, *in whatever form exerted.* This case also makes it clear that regardless of whether the suit is against the agent or the authority or the state, the reach of the Fourteenth Amendment is broad enough to reach not only the states but also "every person, whether natural or juridical, who is a repository of state power". 227 U. S. at page 286.

> "In other words, the Amendment, looking to the enforcement of the rights which it guarantees and to the prevention of the wrongs which it prohibits, proceeds not merely upon the assumption that States, acting in their governmental capacity, in a complete sense, may do acts which conflict with its provisions, but, also conceiving, which was more normally to be contemplated, that state powers might be abused by those who possessed them and as a result might be used as the instrument for doing wrongs, *provided against all and every* such possible contingency. Thus the completeness of the Amendment in this regard is but the complement of its comprehensive inclusiveness from the point of view of those to whom its prohibitions are addressed." *Home Telephone & Telegraph Co. v. City of Los Angeles*, 227 U. S. 278, 288, 33 S. Ct. 312, 315, 57 L. Ed. 510 (1913) (Emphasis supplied).

There is no reason why the states should be any more immune from an attack under the Fourteenth Amendment for a deprivation of property without just compensation than they are in the broader field of civil rights. *Neal v. State of Delaware*, 103 U. S. 370, 26 L. Ed. 567 (1880); *Brown v. Board of Education of Topeka*, 349 U. S. 294, 75 S. Ct. 753, 99 L. Ed. 1083 (1954).

II

Even if the state itself is immune from suit, it cannot delegate its immunity to its public corporations, such as the Thruway Authority.

Even if we assume for the purpose of argument that the state itself is protected in this case by a cloak of immunity, it cannot extend this freedom from suit to agencies and subdivisions it creates. This court has so held in the case of *Hopkins v. Clemson College*, 221 U. S. 636, 31 S. Ct. 654, 55 L. Ed. 890 (1911). In that case, plaintiff landowner sued the defendant for damages to his farm and that defendant be required to abate and remove a dyke. Just as the New York courts have done in the instant case, the South Carolina court there interposed the immunity of the sovereign on behalf of a body, corporate and politic, created by the sovereign (Clemson College), when that body was sued for the violation of a constitutional right. Upon reaching this Court, the error in that reasoning was pointed out as the court held that the defendant college, as well as all other public corporations and political subdivisions, although agencies of the state, are not clothed with that immunity from suit which belongs to the state alone; and while they may be relieved from responsibility to a greater degree than individuals, they cannot rely on immunity as can the state.

The mere fact that the enabling statute and the state court say that an agency is an instrumentality of the state exercising an essential government function is not decisive in giving it the protection of the Eleventh Amendment. *Lowes v. Pa. Turnpike Commission*, 125 F. Supp. 681 (1954).

> "The Eleventh Amendment was not intended to afford them (agents of the state) freedom from liability in any case where, under color of their office, they have injured one of the State's citizens. * * * The whole frame and scheme of the political institutions of this country, state and Federal, protest against extending to any agent the sovereign's exemption from legal process." *Hopkins v. Clemson College*, 221 U. S. at page 643, 31 S. Ct. at page 656.

The issue in *Hopkins* was specifically stated to be "whether a public corporation can avail itself of the State's immunity from suit" 221 U. S. at page 642, 31 S. Ct. at page 656, and the answer was found to be in the negative.

In analogous situations the state's immunity has been held not to extend to (a) state commissions in actions to restrain them from enforcing a statute which illegally burdened interstate commerce, *McNeill v. Southern Ry.*, 202 U. S. 543, 26 S. Ct. 722, 50 L. Ed. 1142 (1905); *Mississippi Railroad Commission v. Illinois Central R. R.*, 203 U. S. 335, 27 S. Ct. 90, 51 L. Ed. 209 (1906); (b) state banks, *Bank of Ky. v. Wister*, 22 U. S. 904, 9 Wheat. 904, 6 L. Ed. 244 (1824); (c) counties, *Lincoln County v. Luning*, 133 U. S. 529, 10 S. Ct. 363, 33 L. Ed. 766 (1890); (d) ports, *Port of Seattle v. Oregon & W. R. Co.*, 255 U. S. 56, 41 S. Ct. 237, 65 L. Ed. 500 (1921).

In the *Port of Seattle* case *supra*, the criterion used in determining whether the state's immunity extended to the port was whether the latter had an independent financial

interest in the property involved. Since the port sold permits to construct wharves and used most of the proceeds to benefit the port, its financial interest was held to be sufficiently independent to take it out of the protection of the Eleventh Amendment. In the instant case the Thruway Authority charges tolls for use of its roads and applies the proceeds to the cost and maintenance of said roads; hence it too has an independent financial interest in the property involved in suit and should not come within the ambit of the protection of the Eleventh Amendment.

III

The extension of the doctrine of sovereign immunity to the Public Authority will open the door to uncontrolled abuse of the rights of the citizen.

The most significant and consequential development in governmental law in recent years has been the rapidly increasing creation of public authorities by governmental units. Edelstein, *The Authority Plan—Tool of Modern Government*, 28 Cornell L. Q. 177. New York State alone has created over one hundred public authorities representing a multi-billion dollar operation. Legislative Document (1956) No. 46, *Staff Report on Public Authorities Under New York State* (hereafter cited as *New York Report*), 5.

The reasons given for the continued and expanding use of the Public Authority were well expressed by President Harry S. Truman in his 1948 Budget Message when he said, "* * * experience indicates that the corporate form of organization is peculiarly adapted to the administration of governmental programs which are predominantly of a commercial character ____ those which are revenue

producing, are at least potentially self sustaining, and involve a large number of business-type transactions with the public." *The Budget of the United States Government for the Fiscal Year Ending June 30, 1948*, M61 (1947).

The administrative reasons for the formation of Public Authorities are expanded upon at great length in the *New York Report:*

> "The functions of public authorities in New York State are chiefly enterpreneurial in character. The operation of public enterprises may require more management flexibility than can be obtained under the usual administrative organization of regular government. In addition, the autonomy of the public authority is believed to lessen the dangers of partisan interference with long-range capital enterprises. The relatively independent administration possible in public authority operations has been a major factor in the creation of most authorities in New York State. *New York Report*, 54."

The powers of a Public Authority are broad. They issue revenue bonds, fix tolls and other charges, take land by eminent domain, enter contracts, lease or purchase appropriate facilities and occasionally police their facilities and issue regulations enforced by penal sanctions. NOTE: 74 Harv. L. Rev. 714.

They usually have the power to sue and be sued, have a seal, hire officers and employees, make by-laws and to manage their own affairs and all the other powers customarily associated the private business. Council of State Governments, *Public Authorities in the States*, 39 (1953).

> "Under the influence of public authorities, an impetus of immense proportions has given rise throughout the nation to legislative programs calling for the construction and development of highways and bridges, water resources and hydroelectric projects, ports and terminals, schools and hospitals, office buildings, util-

> ity systems, and a multitude of other institutional facilities. Gerwig, *Public Authorities: Legislative Panacea?*, 5 J. Pub. L. 387."

The rapid rise of the Public Authority did not go unnoticed nor was it viewed with unmixed emotions. The New York State Constitutional Convention of 1938 considered the question of the rapid expansion of the Public Authority with concern. The Constitutional Convention Committee of 1938 observed:

> "* * * Sometimes the activities of an authority transcend in financial scope the activities of a whole town or village, but they have none of the elements of popular control which accrue as a matter of course to the town or villages. *Report of the Constitutional Convention Committee*, Vol. IV, 1938, p. 191."

This concern naturally arose because the most important single attribute of the Public Authority was its autonomous character.

> "By selecting the Public Authority in preference to a regular governmental unit as the agency for the development of business type projects, a state may by-pass restrictive constitutional provisions, or judicial decisions, and escape from the traditional caution and red tape of bureaucracy. Gerwig, *supra*, 5 J. Pub. L. 387, 390."

The corporate entity of the Public Authority was interposed, "to protect the state from liability and enable public projects to be carried on free from restrictions otherwise applicable." *Plumbing, Heating, Piping and Air Conditioning Contractors Association, Inc. v. New York State Thruway Authority*, 5 N. Y. 2d 420, 423, 185 N. Y. S. 2d 534 (1959). They are not directly responsible to the state, or local government or to the People of the state. *New York Report* 84. The members of these Authorities are appointed for very long terms, generally longer than the

term of the Governor who appointed them. Members of the New York State Thruway Authority, for example, are appointed for a term of nine years. New York *Public Authorities Law*, Section 352; NOTE: *The Applicability of Sovereign Immunity to Independent Public Authorities*, 74 Harv. L. Rev. 714, 720.

The dangers inherent in this autonomy which is so much a part of the concept of the Public Authority led one author to conclude:

> "Thus in its pristine nature the authority concept is admittedly valid. Where in practice, however, either its autonomous political character or allegedly authorized functions degenerate into legal fictions, the foundation of propriety is seriously undermined. Gerwig, *supra*, 5 J. Pub. L. 387, 405."

Thus, for example, in 1956 in the *New York Staff Report* it was stated that too little basic information on authority operations was readily available to either the public or responsible organs of state government. The report foresaw that the authorities might be reluctant to make this information regularly and fully available. *New York Report* 576. This fear reached fruition and indeed obtained judicial sanction in New York in the case of *New York Post Corp. v. Moses*, 10 N. Y. 2d 199, 219 N. Y. S. 2d 7 (1961). The *Moses* case relied on the *Benz* decision (*i.e.* the decision herein).

In addition, it should be noted that the Public Authorities, concerned as they are with their own self interest, perpetuate themselves as long as possible. No New York State Public Authority, for example, has ever voluntarily liquidated. *New York Report* 520.

The combination of self interest and political autonomy militates against the granting of sovereign immunity to the

Public Authority. Should the Public Authority be given the sovereign immunity of the states, they will have achieved a degree of autonomous irresponsibility which is unknown in our law.

The doctrine of sovereign immunity is at best a reluctant vestiage of an earlier era kept alive in the courts, frequently against the better judgments of the judges pronouncing the applicability of the doctrine. The authors of legal articles have been unanimous in their condemnation of the doctrine. Carrow, *Sovereign Immunity in Administrative Law—A New Diagnosis*, 9 J. Pub. L. 1, and authorities collected therein; Stetser, *The Immunities of the State and Government Economic Activities*, 24 Law and Contemp. Prob. 291. See also, NOTE: 40 Minn. L. Rev. 234; NOTE: 42 Cornell L. Q. 540; NOTE: 45 Iowa L. Rev. 621. One author listed what he believed to be five compelling reasons for reform in this area of the law:

> "(1) The injustice of refusing judicial relief when government officers infringe the legal rights of a private party, (2) the impracticability of substituting force or political power for adjudication of controversies that courts are especially qualified to determine, (3) wasteful litigation which stems from judicial fluctuation from one line of authority to another, (4) the almost unbelievable lack of specific judicial inquiry into reasons for the basic doctrine, and (5) disappearance of the only reasons that supported the doctrine of sovereign immunity when the doctrine was introduced into American Law during the first half of the nineteenth century. Davis, *Sovereign Immunity in Suits Against Officers for Relief Other Than Damages*, 40 Cornell L. Q. 3."

The trend against the doctrine has also been evident in the state courts—*e.g. Tompkins v. Kanawha Board*, 19 W. Va. 257 (1881) wherein the court likened a Public Authority having sovereign immunity to "a legalized despot tres-

passing upon the rights of the citizens, who would be powerless to protect themselves" (at page 263). The court in that case went on to say (19 W. Va. at pages 263-264):

> "* * * It would be against all our ideas of State government, if a corporation created by the State to carry on a work of improvement should not be liable like any other corporation for the damage it inflicted, notwithstanding the State might own the property of the corporation. Sovereignty does not reside in such a corporation. The State cannot delegate her sovereignty. There is no creature of the State above the law and irresponsibile. If this were so, the corporation might deny to certain individuals all benefits to be conferred by the corporation, and yet it being sovereign or representing sovereignty it could not be sued."

See also *Molitor v. Kaneland Community Unit Dist. No. 302*, 18 Ill. 2d 11, 163 N. E. 2d 89 (1959) where the doctrine was called "mistaken and unjust"; *Hargrove v. Town of Cocoa Beach, (Fla.)*, 96 So. 2d 130 (1957) (doctrine was called "anachronistic"). It is not surprising, therefore, that the other states that have considered the doctrine of sovereign immunity in connection with their highway authorities have rejected it. *Taylor v. New Jersey Highway Authority*, 22 N. J. 454, 126 A. 2d 313 (1956); *State ex rel. State Highway Commission v. Bates*, 317 Mo. 696, 296 S. W. 418 (1927); *People v. Illinois State Toll Hwy. Comm.*, 3 Ill. 2d 218, 120 N. E. 2d 35 (1954).

The federal courts have also participated in the trend toward the diminution of sovereign immunity. *Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U. S. 381, 59 S. Ct. 516, 83 L. Ed. 784 (1939); *Sloan Shipyards Corp. v. U. S. Shipping Board Emergency Fleet Corp.*, 258 U. S. 549, 42 S. Ct. 386, 66 L. Ed. 762 (1922); see NOTE: 45 Iowa L. Rev. 621.

In view of this status of the law, the doctrine of sovereign immunity should not be extended to a Public Authority. As we have shown, a Public Authority is granted all of the privileges and powers of a corporation. In fact, in New York State, a Public Authority is specifically defined as a public corporation. New York *Public Authorities Law*, Section 352.

A government is, in the last analysis, responsible to the people of state. A Public Authority has no such responsibility. If it is held that it partakes of the immunity of the sovereign, then it will not be responsible to the courts. There is no creature known to the common law which has such a broad immunity. Extension of immunity into this area is contrary to all democratic principles and should not be countenanced by this Court.

New York has conferred upon the respondent herein the right to acquire real property by appropriation. New York *Public Authorities Law*, Sec. 358. Under this method of taking real property, the land becomes the property of the Authority or other taking body immediately upon the filing of the appropriate maps. New York *Highway Law*, Sec. 347, subdivisions (5) and (5a).

When this power is exercised, it is important that there be sufficient safeguards so that those landowners, who are being deprived in many cases of their most cherished possession, are afforded their Constitutional guarantee of "just compensation" for the land which is taken from them. If we are to permit these Authorities to procure land at an unfair price by whatever fraudulent or forceful methods their agents may use, and then allow them to hide behind the shield of state immunity when a landowner sues to receive his just due, the Constitutional

guarantee of "Just Compensation" will become meaningless.

These governmental agencies have already taken enormous amounts of private land; in the future it can be expected they will take much more.

The New York appropriation statute provides a method whereby the person whose land has been taken may enter into an agreement as to the value of the land. New York *Public Authorities Law*, Sec. 358. Under the decision in the Court below, this agreement stands regardless of the fraud or other unlawful means by which it may have been secured. It is apparent that many of those persons who will have their lands taken from them by the State will be elderly people such as the petitioner and her husband, or persons of lesser intelligence, or persons who would merely rely upon that degree of fairness which they would normally expect when dealing with their State or Federal Government. To protect such persons from being duped by the over-zealous or unscrupulous agent of the taking body, it is essential that immunity not exist in these cases. Otherwise, the floodgates will be open to a rash of abuses whereby the lifesavings of an individual may be swept away "without any remedy". *Benz v. New York State Thruway Authority*, 9 N. Y. 2d 486, 490, 215 N. Y. S. 2d 47, 49, 174 N. E. 2d 727 (1961).

IV

Even if the Court held that the New York State Thruway Authority partakes of the sovereign immunity of the state, such immunity will not bar the present action.

The holding of the New York Court of Appeals in this case is that the New York rules of sovereign immunity

effectively bar any legal action by a citizen who was fraudulently induced to sell her land to the Thruway Authority for one-twentieth of its value. Ordinarily questions of sovereign immunity are determined by state law. *Curran v. State of Arkansas*, 56 U. S. 304, 15 How. 304, 14 L. Ed. 705 (1851).

The Supreme Court, however, recognizes two very clear exceptions to the doctrine of sovereign immunity. Where the action of the official was effected under an unconstitutional statute, *Ex parte Young*, 209 U. S. 123, 28 S. Ct. 441, 52 L. Ed. 714, 13 L. R. A., N. S. 932 (1908), and where the action was undertaken in an unconstitutional manner, *Pennoyer v. McConnaughy*, 140 U. S. 1, 11 S. Ct. 699, 35 L. Ed. 363 (1891) the courts have not been stopped by the doctrine of sovereign immunity even though the actual effect has been to affect state action.

United States v. Lee, 106 U. S. 196, 1 S. Ct. 240, 27 L. Ed. 171 (1882) is perhaps the leading case on the constitutional exception to the doctrine of sovereign immunity. In that case the Court said (106 U. S. at page 220, 1 S. Ct. at page 260)—

> "* * * it is absolutely prohibited, both to the executive and the legislative, to deprive anyone of life, liberty, or property without due process of law, or to take private property without just compensation."

Nothing contained in *Larson v. Domestic & Foreign Commerce Corporation*, 337 U. S. 682, 69 S. Ct. 1457, 93 L. Ed. 1628 (1949) lessens the force of the *Lee* case in relation to the present case. The Court in that case said (337 U. S. at page 704, 69 S. Ct. at page 1468)—

> "Under our constitutional system, certain rights are protected against governmental action and, if such rights are infringed by the actions of officers of

the Government, it is proper that the courts have the power to grant relief against those actions."

In the case at bar, the petitioner's property was taken from her without her consent by the exercise of the power of eminent domain. She then was induced by fraud to execute an agreement which inadequately fixed her compensation for the property which was taken. She expected fairness and truthfulness from the representative of her state government. (There is attached to this brief, as part of the Appendix, an article which appeared in the Western New York press indicative of the way in which such adjustments are handled. Although the article relates to a different state agency, the method of proceeding and the publicity given are the same. Appendix B, *infra*, p. 32.)

The plaintiff was not, however, treated fairly. She was deprived of just compensation by the fraud of the agent of the Thruway Authority. Fraud can never constitute due process of law, and compensation fraudulently determined is not just compensation. Petitioner has alleged fraud on the part of the respondent in the execution of the agreement wherein the compensation for her land was fixed and such allegation must be accepted as true for the purpose of this proceeding. *Locke v. Pembroke*, 280 N. Y. 430, 21 N. E. 2d 495 (1939).

Moreover, once the contract was signed by her, regardless of the fraud, undue influence, force or duress which may have been used, she was "without any remedy". *New York Post Corp. v. Moses*, 10 N. Y. 2d 199, 219 N. Y. S. 2d 7 (1961) makes it clear that the Benz case (the case at bar) stands for the proposition that Public Authorities are subjected only to those procedures which have been specifically mandated. The Court of Appeals in

the Benz case held specifically that no relief had been mandated in any way and that the petitioner was therefore "without any remedy". (9 N. Y. 2d at page 490, 215 N. Y. S. 2d at page 49.)

Thus, by reason of fraud, the petitioner has been unconstitutionally deprived of her property without just compensation. The New York Supreme Court is the court of general jurisdiction in law and equity under Article VI, Section 1 of the New York State Constitution. This court has the power given to it by the State Constitution to entertain this action. Indeed, prior to the decision in the Benz case, the New York Courts had held that the New York Supreme Court had jurisdiction over the Thruway Authority. *Pantess v. Saratoga Springs Authority*, 255 App. Div. 426, 8 N. Y. S. 2d 103 (1938); *Strang v. State*, 206 Misc. 734, 134 N. Y. S. 2d 871 (1954). Should this court reverse the decision of the Court of Appeals herein, the case would properly be heard by the New York Supreme Court.

The unconstitutional taking of the petitioner's property without just compensation and without remedy places this case squarely within the constitutional exception to the doctrine of sovereign immunity. It would not only be unconstitutional but also unconscionable if the petitioner were to have no redress. See 3 *Nichols On Eminent Domain*, 151; *O'Donnell v. Clinton*, 145 Mass. 461, 14 N. E. 747 (1888).

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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Appendix A

United States Constitution, Fifth Amendment.

> "* * * nor shall private property be taken for public use, without just compensation."

United States Constitution, Eleventh Amendment.

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

New York State Constitution, Article 1, Section 7. (a).

> "Private property shall not be taken for public use without just compensation."

New York State Constitution, Article VI, Section 1.

> "The supreme court is continued with general jurisdiction in law and equity, subject to such appellate jurisdiction of the court of appeals as now is or hereafter may be prescribed by law not inconsistent with this article. * * *"

New York *Highway Law*, Section 347, Subdivision 5.

> "On the filing of such description and map in the office of the department of state, the people of the state of New York, their officers and agents, may immediately enter upon and take possession of the property so described for any and all purposes connected with the thruway system of the state of New York."

New York *Highway Law*, Section 347, Subdivision 5-a.

> "A copy of such description and map shall be filed by the superintendent of public works in the office of

the county clerk or register of each county in which such property, or any portion thereof, is situated and thereupon the appropriation by the state of the property described in such description and map shall be deemed complete and the title to such property shall become and be the property of the people of the state of New York."

New York *Public Authorities Law*, Section 352.

"1. A board to be known as 'New York state thruway authority' is hereby created. Such board shall be a body corporate and politic constituting a public corporation. It shall consist of three members appointed by the governor by and with the advice and consent of the senate. The members first appointed shall serve for terms ending three, six and nine years, respectively from January first next succeeding their appointment. Their successors shall be appointed for terms of nine years each. * * *"

New York *Public Authorities Law*, Section 358.

"1. On assuming jurisdiction of a thruway section or connection or any part thereof, or of a highway connection, the authority may from time to time determine what real property is necessary for the construction, improvement and operation thereof, in addition to real property theretofore acquired by the state. If funds are made available by the authority for payment of the cost and expense of the acquisition thereof, the superintendent when requested by the authority shall acquire such real property in the name of the state by appropriation, and, where necessary, remove the owner or occupant thereof and obtain possession according to the procedure provided by section three hundred forty-seven of the highway law. The authority shall have the right to possess and use for its corporate purposes so long as its corporate existence shall

continue all such real property and rights in real property so acquired.

"2 Claims for the value of the property appropriated and for legal damages caused by any such appropriation shall be adjusted and determined by the superintendent with the approval of the authority, or by the court of claims as provided in said section three hundred forty-seven. When a claim has been filed with the court of claims, the claimant shall cause a copy of such claim to be served upon the authority and the authority shall have the right to be represented and heard before said court. All awards and judgments arising from such claims shall be paid out of moneys of the authority."

Appendix B

BUFFALO EVENING NEWS, JUNE 22, 1961.

State Checking Title to Site of A-Waste Center.

Little Valley, June 22—A team of attorneys and examiners from the State Public Works Department is checking records in the Cattaraugus County Clerk's office to verify titles to 44 parcels in the Town of Ashford where a state nuclear service facility will be located.

The State Office of Atomic Development Monday took titles to the properties, totaling 331 acres, by filing an official map of the site.

It was disclosed that the owners of the 30 farms which were taken entirely as well as parts of 14 others will enjoy tax-free status until they are required to vacate. It was explained that the procedure automatically removes the property from the Town of Ashford tax rolls and transferred the titles to the state.

Occupancy to Continue

A spokesman said that the occupants may continue normal use of their tracts "at the pleasure of the state."

It was indicated that no one will be evicted before next spring.

The title searching formality was explained as a prelude to the property acquisition negotiations. *When this operation is complete, teams of representatives will deal with each property owner on the basis of "fair market values."* (Emphasis supplied.)

• • •

SUPREME COURT, U. S.
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(1040)

IN THE

Supreme Court of the United States

No. 234—October Term, 1961

MARIE BENZ,

Petitioner,

against

NEW YORK STATE THRUWAY AUTHORITY,

Respondent.

RESPONDENT'S BRIEF

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IN THE

Supreme Court of the United States

No. 234—October Term, 1961

MARIE BENZ,

Petitioner,

against

NEW YORK STATE THRUWAY AUTHORITY,

Respondent.

RESPONDENT'S BRIEF

Opinions Below

Special Term of the Supreme Court of the State of New York, in an opinion dated February 11, 1960 (unreported), dismissed the petitioner's complaint (5-11).[1]

The memorandum decision of the Appellate Division of the Supreme Court is reported at 11 A. D. 2d 906, 205 N. Y. S. 2d 1004 (28), and resulted in an order of affirmance entered July 1, 1960 (26-27).

The majority opinion of the Court of Appeals of the State of New York, rendered April 27, 1961, affirming the decision below, and the dissenting opinion are reported at 9 N. Y. 2d 486, 174 N. E. 2d 727 (32-37).

[1] All references are to pages in the Record herein.

By order, dated October 5, 1961, the Court of Appeals (10 N. Y. 2d 806) amended its remittitur by adding the following (38-39):

> "Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, *viz.*: Whether plaintiff was deprived of just compensation in violation of the due process clause of the Fourteenth Amendment. The Court of Appeals held there was no such deprivation or violation."

Jurisdiction

The grounds on which the jurisdiction of this Court is invoked are set forth in Petitioner's Brief (p. 2).

On October 23, 1961 this Court granted the petition for a writ of certiorari (41) (368 U. S. 886).

Questions Presented

1. Whether this Court may review the determination of the New York Court of Appeals that the State of New York and the respondent herein are immune to suits in equity.

2. Assuming, *arguendo*, that such power of review does reside in this Court, whether the respondent, as an instrumentality of the State, engaged in an operation which is purely governmental in nature, is clothed with the sovereign's immunity to suits in equity.

3. Whether the immunities of the State, as guaranteed by the Eleventh Amendment to the Federal Constitution are overridden by the "due process" clause of the Fourteenth Amendment.

4. Whether petitioner is entitled to equitable relief in the face of available adequate remedies at law.

Constitutional Provisions and Statutes Involved[2]

Involved in this application are:

United States Constitution, Amendments XI and XIV;
New York Public Authorities Law, Title 9.
New York Highway Law § 347:
New York Court of Claims Act § 10 (1).

Statement

The Attorney General of the State of New York appeared specially for the respondent and moved to set aside the service of the summons on the ground that the Court did not have jurisdiction over the person of the respondent, or in the alternative, to dismiss the complaint on the ground that the Court did not have jurisdiction over the subject matter of the action (21).

The complaint (12-16) alleges that the petitioner and the respondent[3] entered into an Agreement of Adjustment (17-20) to reimburse the petitioner for the value of certain property appropriated by the Superintendent of Public Works of the State of New York for Thruway purposes, and that by reason of the mutual mistake of the petitioner and the respondent or by the mistake of the petitioner and the fraud of the respondent, the Agreement of Adjustment was incorrectly drawn and does not state the actual agreement of the parties. The actual agreement is separately set forth in the complaint.

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[2] The pertinent sections of the Constitution and the statutes are set forth in the Appendix hereto.

[3] It may be observed that the Agreement of Adjustment was executed on behalf of the respondent by the Director of the Bureau of Rights of Way and Claims, which is a division of the Department of Public Works of the State of New York, and the agreement was approved by an agent of the *State* Comptroller (20).

The petitioner seeks relief in the alternative—either reformation, as is in the complaint specifically set forth, or rescission.

Summary of Argument

The New York Court of Appeals has held that the State of New York has not waived its immunity with respect to suits in equity. It has also held that, as an agency of the State of New York engaged in a purely governmental function, the New York State Thruway Authority was entitled to assert the same immunity from suit, except insofar as the Legislature may have waived immunity. In other words, the action against the Authority was considered, in effect, as an action against the State. The Court found that there had been no legislative waiver, as to the Authority, respecting suits for traditional equitable relief. Since the instant action is one for traditional equitable relief—reformation or rescission—the Court of Appeals affirmed the judgment of the Court below, which had dismissed the complaint.

It is not within the purview of this Court's power of appellate review to overrule the State Court on this question because the issue of law is within the peculiar prerogative of the State to determine for itself. This is implicit in the provisions of the Eleventh Amendment to the Federal Constitution. Numerous decisions of this Court, cited in the Argument, *infra*, establish clearly that the sovereign immunity of the States which is guaranteed by this Amendment is absolute, that the question of waiver depends upon whether the State intended to waive the immunity, and that the question whether there has been a waiver and the extent thereof are determinable only by the State Courts. Whether the question arises in connection

with the jurisdiction of the lower Federal Courts in cases originating in such Courts, or whether the question arises for the first time, as here, upon appellate review by this Court of the State Court's determination, the rule is applied equally.

Thus, that the New York State Thruway Authority is a governmental agency of the State of New York and, as such, immune to a suit in equity, is to be accepted as the governing principle of State law.

However, assuming, *arguendo*, that this Court does possess the power to review this question, it is submitted that, in fact, the Authority is an agency of the State engaged in a purely governmental function and, as such, virtually identical with the State, so that it has the same immunities as has the State itself.

Therefore, whether considered without review or after review, the basic premise of immunity should be accepted and subjected to the only true Federal question which has been submitted to this Court—are the immunities guaranteed under the Eleventh Amendment subject to the due process provision of the Fourteenth Amendment? Does the Fourteenth Amendment override or repeal the Eleventh?

In the consideration of this question, the Court may not give weight to the fact that other States may have tended in recent years to cut down or limit the concept of sovereign immunity or that the Federal Courts, in dealing with Federal agencies, have, likewise, impugned the concept. Each State has the right to decide this question for itself. Its right to do so is absolute.

The sole question to be decided by this Court is the relative supremacy of the Eleventh and Fourteenth Amend-

ments. Case after case in this Court has enunciated the supremacy of the Eleventh Amendment—that the right of individuals to sue a State, in either a Federal or a State Court, cannot be derived from the Constitution or laws of the United States, but can come only from the consent of the State.

In essence, the petitioner's argument begs the question. She asserts that when property is taken by eminent domain, the failure of the Legislature to provide a remedy or permit suit does not defeat suit because the constitutional provision for "just compensation" is self-executing. This is undoubtedly true because the constitutional provision, itself, constitutes a waiver of immunity. It must be observed, however, that in the case at bar we are not dealing with an uncompensated act of eminent domain, but rather with the right of an individual to sue the State in an equitable action seeking reformation or rescission of a contract.

In any event, disregarding the question of immunity, it is clear, as appears in the ensuing argument, that adequate relief at law is available to the petitioner in the State's Court of Claims. The existence of adequate relief at law, of course, is sufficient to defeat this suit in equity.

ARGUMENT

POINT I

The petition for certiorari was improvidently granted by the Court and should now be dismissed for want of a substantial Federal question.

A. The question of sovereign immunity is a question of State law which is not reviewable in this Court.

In the case at bar the New York Court of Appeals stated its conclusion of law that "for purposes of suit the Thru-

way Authority was part of the State Government and, accordingly, not suable without a direct waiver of immunity" (9 N. Y. 2d 486, 489, 174 N. E. 2d 727, 728). This was merely a reiteration of its earlier pronouncement in *Easley* v. *New York State Thruway Authority*, 1 N. Y. 2d 374, 135 N. E. 2d 572 (1956).

That the State is immune to suit and liability of any kind except in those instances where it has consented thereto by an express and specific constitutional or legislative enactment, is ancient and well established doctrine which has been consistently followed in the State of New York (*Stone* v. *State of New York*, 138 N. Y. 124, 130, 33 N. E. 733 [1893]; *Matter of Hoople*, 179 N. Y. 308, 311, 72 N. E. 229 [1904]; *Sanders* v. *Saxton*, 182 N. Y. 477, 479, 75 N. E. 529 [1905]; *Saranac Land and Timber Co.* v. *Roberts*, 195 N. Y. 303, 320, 88 N. E. 753 [1909]; *Niagara Falls Power Co.* v. *White*, 292 N. Y. 472, 479, 55 N. E. 2d 742 [1944]). Dispositive of the question of immunity is *Psaty* v. *Duryea*, 306 N. Y. 413, 416-417, 118 N. E. 2d 584 (1954), in which the highest Court of the State of New York held:

(1) That the State may not be sued in any Court upon any cause of action unless it has expressly and explicitly waived its sovereign immunity with respect to such cause of action; and

(2) That the State has not given its consent to be sued upon a cause of action which is, primarily, an equitable action for rescission, and thus, "a suit for traditional equitable relief."

In the State Courts the petitioner sought a reconsideration of the doctrine of sovereign immunity but met with utter failure. Whatever the present rule may be in other jurisdictions, including the Federal, there is no doubt that

in New York the doctrine remains unchanged and that it applies not only to cases where the State is named as a party defendant, but to cases, in which, though not a nominal party, it is such in effect (*Psaty* v. *Duryea, supra; Breen* v. *Mortgage Commission of the State of New York*, 285 N. Y. 425, 35 N. E. 2d 25 [1941]; *Glassman* v. *Glassman*, 309 N. Y. 436, 131 N. E. 2d 721 [1956]; *Easley* v. *New York State Thruway Authority, supra; Benz* v. *New York State Thruway Authority, supra* [case at bar]).

The determination of the question of sovereign immunity is peculiarly a matter of State law which is adequate to support the determination and which is not reviewable in this Court. This is implicit in the provisions of the Eleventh Amendment to the Federal Constitution.[4]

Preliminarily, it may be observed that the fact that the petitioner is a citizen of the State and the fact that the State is not a party to the suit of record are not inhibiting influences in the application of the Eleventh Amendment to the case at bar. A suit against a State by one of its own citizens, the State not having consented to suit, is as much forbidden as are suits by citizens of another State or by citizens or subjects of foreign States (*Hans* v. *Louisiana*, 134 U. S. 1 [1890]; *Fitts* v. *McGhee*, 172 U. S. 524 [1899]; see, also: *Gunter* v. *Atlantic Coast Line R. Co.*, 200 U. S. 273 [1906]; *Georgia R. R. & Banking Co.* v. *Redwine*, 342 U. S. 299 [1952]). And in *In re Ayers*, 123 U. S. 443, 487-492 (1887), it was held that the doctrine of sovereign immunity was not restricted to cases in which the State was a party of record.

Although we are not here concerned with the determination of Federal jurisdiction insofar as suit may be com-

[4] See Appendix, *infra*, p. 1a.

menced in the lower Federal Courts, it is interesting to note that even in such cases, where consideration has been given to the impact of the Eleventh Amendment, it has been uniformly held that State law and the decisions of State Courts are dispositive of the question. Thus, even when the status of the State, engaged in a purely private enterprise, was involved, the State law was held to require a dismissal of the Federal suit for want of jurisdiction (*State of North Dakota* v. *National Milling & Cereal Co.*, 114 F. 2d 777 [8th Cir., 1940]). The same rule has been applied to the determination of the nature, rights, powers, duties, obligations and liabilities of counties, municipalities, townships and other public corporations. Thus, in *Railroad Commission of California* v. *Los Angeles Ry. Corp.*, 280 U. S. 145 (1929), this Court said (p. 152):

> "This Court is bound by the decisions of the highest courts of the States as to the powers of their municipalities."

And in *Georgia Ry.* v. *Decatur*, 262 U. S. 432 (1923), it was said (p. 438):

> "This conclusion [*i.e.*, the determination of the Supreme Court of Georgia], involving, as it does, a construction of the state constitution and laws and powers of state municipalities is controlling upon this Court, as it has decided many times. See, for example: *Old Colony Trust Co.* v. *Omaha*, 230 U. S. 100, 116; *Claiborne County* v. *Brooks*, 111 U. S. 400, 410; *Richmond* v. *Smith*, 15 Wall. 429, 438."

In *Richmond* v. *Smith*, 15 Wall. 429 (1872), cited in the *Decatur* case, *supra*, the Court said (p. 438):

> "State courts certainly have a right to expound the statutes of the State, and having done so, those statutes, with the interpretation given to them by the highest court of the State, become the rules of decision in the Federal courts."

See also: *Louisiana Land & Exploration Co.* v. *State Mineral Board*, 229 F. 2d 5 (5th Cir., 1956), cert. den. 351 U. S. 965 (1956); *Dupont* v. *South Carolina Public Service Authority*, 100 F. Supp. 778 (E. D., So. Carolina, 1951); *Fleming* v. *Upper Dublin Public School District*, 141 F. Supp. 813 (E. D., Pennsylvania, 1956).

Even in cases other than those involving the Eleventh Amendment, where Federal jurisdiction is conceded, it has been held time and again that the Federal rule of decision on the substantive question must follow the State rule (*Commissioner of Internal Revenue* v. *Stern*, 357 U. S. 39, 45 [1957]; *Vandenbark* v. *Owens-Illinois Glass Co.*, 311 U. S. 538 [1941]; *West* v. *American Telephone & Telegraph Co.*, 311 U. S. 223 [1940]; *Russell* v. *Todd*, 309 U. S. 280 [1940]; *Wichita Royalty Co.* v. *City National Bank*, 306 U. S. 103 [1939]). In *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938), this Court said (p. 78):

> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts."

The rule which requires Federal Courts in such cases to follow the State law applies even though the State Court rulings are contrary to the weight of authority (*Johnson* v. *New York Life Ins. Co.*, 212 F. 2d 256 [7th Cir., 1954], cert. den. 348 U. S. 836 [1954]), contrary to the views of the Federal Court (*Johnson* v. *New York Life Ins. Co.*,

supra; Kraus v. *Greenbarg*, 137 F. 2d 569, 571 [3rd Cir., 1943], cert. den. 320 U. S. 791 [1943]), or even though there is a well established Federal rule on the subject (*West* v. *American Telephone & Telegraph Co., supra*).

Since, as has been demonstrated, the question of State immunity is a matter of State law, it follows that the treatment of this question, upon certiorari to the State Court, as in the case at bar, can be no different from its treatment in determining original Federal jurisdiction. The State law applies as effectively in the one case as it does in the other, and this Court has so held. In *Caldarola* v. *Eckert*, 332 U. S. 155 (1947), the Court said (p. 158):

> "Insofar as the issues in this case exclusively concern New York law, that court [*i.e.*, the New York Court of Appeals] had the final say * * *."

As a general rule, the highest Court of a State may administer the common law according to its own understanding and interpretation, without liability to review in this Court unless some right, title, immunity or privilege, Federaliy created, has been asserted and denied (*American Ry. Express Co.* v. *Kentucky*, 273 U. S. 269 [1927]; *West* v. *Louisiana*, 194 U. S. 258 [1904]). The determination in the case at bar by the New York Court of Appeals that the respondent is an instrumentality of the State engaged in a purely governmental function and is not suable in an action in equity by reason of the fact that the suit is, in effect, against the State, is a sufficient non-federal ground, the correctness of which cannot be considered in this Court (*Radio Station WOW* v. *Johnson*, 326 U. S. 120, 129 [1945]). This Court has held that it will not inquire whether a State Court decision, denying constitutional protection to rights asserted under local law on non-federal grounds, fairly supported, is right or wrong, where the con-

stitutional issue is not evaded. In *Demorest* v. *City Bank Farmers Trust Co.*, 321 U. S. 36 (1943), the Court quoted (p. 42) from *Broad River Power Co.* v. *South Carolina*, 281 U. S. 537, 540 (1930) as follows:

> " 'But if there is no evasion of the constitutional issue, and the non-federal ground of decision has fair support, this Court will not inquire whether the rule applied by the state court is right or wrong, or substitute its own view of what should be deemed the better rule, for that of the state court.' "

See also, *Fox River Paper Co.* v. *Railroad Commission of Wisconsin*, 274 U. S. 651, 655 (1927).

The contention that the State law, whether statutory or decisional, is void because it is contrary to public policy does not present a Federal question (*Endicott Johnson Corp.* v. *Encyclopedia Press, Inc.*, 266 U. S. 285, 290 [1924]). Insofar as this Court may have expressed a policy in favor of a contraction of the sovereign immunity doctrine in cases affecting the *National Government's* immunity (see *e.g.*, *Keifer & Keifer* v. *Reconstruction Finance Corp.*, 306 U. S. 381, 388-389 [1939]), we must keep in mind, first, this Court's distinction between State and National immunity, as set forth in the *Keifer* case (p. 388):

> "As to the states, legal irresponsibility was written into the Eleventh Amendment; as to the United States, it is derived by implication."

Second, we must note this Court's observation in *Fay* v. *New York*, 332 U. S. 261 (1947), at page 287:

> "Over federal proceedings we may exert a supervisory power with greater freedom to reflect our notions of good policy than we may constitutionally exert over proceedings in state courts, and *these expressions of policy are not necessarily embodied in the concept of due process.*" (Emphasis added.)

In the last analysis, when the alleged basis of waiver of the Eleventh Amendment's immunity is a State statute, as is the situation in the case at bar, the question to be answered is whether the State has intended to waive its immunity (*Petty* v. *Tennessee-Missouri Bridge Commission*, 359 U. S. 275, 278 [1959]). From the foregoing analysis, it is apparent that the only Court which is legally competent to answer this question is the State Court, and that this Court accepts the State Court's interpretation of State law (*Demorest* v. *City Bank Farmers Trust Co.*, 321 U. S. 36, 49 [1944]; *Chicago, etc., R. Co.* v. *Risty*, 276 U. S. 567, 570 [1928]; *Quong Hoa Wah Co.* v. *Industrial Commission*, 255 U. S. 445, 448 [1921]; *Sauer* v. *New York*, 206 U. S. 536, 545-548 [1907]; *People of Sioux County* v. *National Surety Co.*, 276 U. S. 238, 240 [1928]; *St. Louis & Kansas City Land Co.* v. *Kansas City*, 241 U. S. 419, 427 [1916]; *Johnson* v. *New York Life Ins. Co.*, 187 U. S. 491, 496 [1903]; *Ross* v. *Oregon*, 227 U. S. 150, 162 [1913]).

The petitioner suggests a contraction, if not, indeed, an abandonment, of the doctrine of sovereign immunity (Brief, pp. 21 *et seq.*), but forgets (1) that irresponsibility has been constitutionally incorporated into the law by the Eleventh Amendment, and (2) that she is addressing a Court and not the Legislature. It is for the latter to determine whether the State shall be put in a position to be cast, as Dean Pound put it (Fortune, Nov. 1949, p. 171), in the role of the "involuntary good samaritan." It is for the latter to consider, on the policy level, whether for reasons of reparation, prevention or otherwise, it will lower the bar. So long as the Eleventh Amendment remains the law of the land, it rests with the State Legislature alone to waive its benefits, and its failure to do so cannot be overridden by judicial action either in the State or the Federal

Courts. The legislative discretion is absolute; only State legislative consent can effect a waiver.

B. Asserted rights of individuals under the Fourteenth Amendment to the Federal Constitution are not superior to, and do not override, the provisions of the Eleventh Amendment.

One of the questions which the petitioner has presented to this Court is the question whether the "due process" provision of the Fourteenth Amendment overrides a State's immunity from suit (Petitioner's Brief, p. 8). The petitioner asserts that, so far as the Federal Courts are concerned, the question is novel.

However, the question is not novel and has, in several cases, been decided by this Court adversely to the petitioner's contention. This Court has held that sovereign immunity may be asserted by a State in actions which seek to enforce rights which are generally protected under the due process or other provisions of the Constitution. In *Missouri* v. *Fiske*, 290 U. S. 18 (1933), it was said (pp. 25-26):

> "The Eleventh Amendment is an explicit limitation of the judicial power of the United States. 'The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State or by citizens or subjects of any foreign State.' However important that power, it cannot extend into the forbidden sphere. Considerations of convenience open no avenue of escape from the restriction. The 'entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given.' *Ex parte New York*, 256 U. S. 490, 497. *Such a suit cannot be entertained upon the ground that the controversy arises under the Constitution or*

> *laws of the United States. Hans* v. *Louisiana*, 134 U. S. 1, 10; *Palmer* v. *Ohio*, 248 U. S. 32, 34; *Duhne* v. *New Jersey*, 251 U. S. 311, 313, 314." (Emphasis added.)

In *Hans* v. *Louisiana*, 134 U. S. 1 (1890), the constitutional provision which was involved was the provision against the impairment of the obligation of contracts. In *Palmer* v. *Ohio*, 248 U. S. 32 (1918), as in the case at bar, it was contended that the "due process" provision of the Constitution justified a disregard of the doctrine of sovereign immunity. The Court rejected this contention, saying (p. 34):

> "The right of individuals to sue a State, in either a federal or a state court, cannot be derived from the Constitution or laws of the United States. It can come only from the consent of the State. *Beers* v. *Arkansas*, 20 How. 527; *Railroad Company* v. *Tennessee*, 101 U. S. 337; *Hans* v. *Louisiana*, 134 U. S. 1."

Insofar as the petitioner has posed the question of the relative supremacy of the Eleventh Amendment *vis-à-vis* the "just compensation" clause of the Fifth Amendment as it may be deemed included in the "due process" clause of the Fourteenth Amendment (Petitioner's Brief, p. 3), it is important to note that her lawsuit does not involve the taking of property without the payment of just compensation. Such an uncompensated taking was involved in *Hopkins* v. *Clemson College*, 221 U. S. 636 (1911), cited by petitioner, but it is this very aspect of the cited case which renders it inapposite to the issue herein. We do not resist the contention that sovereign immunity is no defense to a taking under the power of eminent domain. Indeed, whatever immunity there may originally have been to such a suit against the State has been waived in the most effective way and on the broadest possible base by the provision of

the State Constitution which provides for the payment of just compensation upon a taking by eminent domain (New York Const. Art. I § 7).[5]

However, that is not the situation in the case at bar. Although the contract which is the subject of this suit dealt with the compensation which was to be paid by reason of an act of eminent domain, the question before the Court does not involve the factual situation which underlay and brought about the making of the contract. Rather, it involves the *making* of the contract and, more directly, an asserted right to sue the State in an equitable action seeking either to *make over* or *undo* the contract. The action is for reformation or rescission of the contract, and the subject of the contract is irrelevant to the resolution of the question here presented.[6]

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[5] This conceded constitutional waiver respecting State liability as a result of an act of eminent domain is all that may be gleaned from the cases cited by the petitioner on pages 9-11 of her brief. The State cases there cited merely stand for the proposition that if an act of eminent domain is the basis of State liability, the constitutional provision for "just compensation" is self-executing and the failure of the Legislature to provide a remedy does not permit the assertion of immunity by the State or its agents in an action predicated on that liability. We agree, but we must reiterate that this lawsuit does not involve an act of eminent domain. It involves a suit to reform or rescind a contract. It is merely by coincidence that the liability arising from an act of eminent domain was the motivating force which led to the making of the contract. The factor which led to the contract is no more legally relevant to the issue than if the contract involved a sack of potatoes.

[6] Incidentally, the assertion by the petitioner (Brief, p. 12) that, in one guise or another, suits have often been allowed against the sovereign is without support in the decisions of this Court which she cites. In the first place, in all of the cases cited the sovereign involved was the United States, so that the Eleventh Amendment did not come into play. Secondly, taking the first case cited as typical of this Court's view, even in its earlier days—*The Siren*, 7 Wall. 152 (1868)—we find the Court reiterating the doctrine of sovereign im-

(Footnote continued on following page)

It is pertinent to observe, in this connection, that sovereign immunity extends to the enforcement of equitable rights and the prosecution of equitable remedies by an individual against a State. In *Missouri* v. *Fiske*, 290 U. S. 18 (1933), the Court said (p. 27):

> "The fact that the motive for the adoption of the Eleventh Amendment was to quiet grave apprehensions that were extensively entertained with respect to the prosecution of state debts in the federal courts cannot be regarded, as respondents seem to argue, as restricting the scope of the Amendment to suits to obtain money judgments. The terms of the Amendment, notwithstanding the chief motive for its adoption, were not so limited. Expressly applying to suits in equity as well as at law, the Amendment necessarily embraces demands for the enforcement of equitable rights and the prosecution of equitable remedies when they are asserted and prosecuted by an individual against a State. This conception of the Amendment has had abundant illustration. *Louisiana* v. *Jumel*, 107 U. S. 711, 720; *Hagood* v. *Southern*, 117 U. S. 52, 67; *In re Ayers*, 123 U. S. 443, 497; *Fitts* v. *McGhee*, 172 U. S. 516, 529."

In the consideration of the Eleventh and Fourteenth Amendments in juxtaposition to each other, consideration

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(Footnote continued from preceding page)

munity as a "familiar doctrine of the common law" (p. 153), from which it would not recede. However, since the United States had *instituted* the action the defendant was permitted to assert, by way of set-off, an affirmative defense, but not a counterclaim. The Court said (p. 154): "But although direct suits cannot be maintained against the United States, or against their property, yet, when the United States institute a suit, they waive their exemption so far as to allow a presentation by the defendant of set-offs, legal and equitable, to the extent of the demand made or property claimed, and when they proceed *in rem*, they open to consideration all claims and equities in regard to the property libelled. They then stand in such proceedings, with reference to the rights of defendants or claimants, precisely as private suitors, except that they are exempt from costs and from affirmative relief against them, beyond the demand of property in controversy."

may well be given to the analogous statement of this Court in *State Board of Equalization* v. *Young's Market Co.*, 299 U. S. 59, 64 (1936):

> "A classification recognized by the Twenty-first Amendment cannot be deemed forbidden by the Fourteenth."

By the same token the immunities guaranteed to the States by the Eleventh Amendment cannot be deemed forbidden by the Fourteenth.

From the foregoing it is apparent that it cannot be asserted that the Fourteenth Amendment has resulted in the repeal of the Eleventh Amendment, whether we consider the impact of the guarantee of "due process" alone or the impact of the guarantee of "just compensation" as included in the concept of "due process." Since the non-federal ground—sovereign immunity—was the basis of the adjudication by the Court of Appeals, and since, as has been demonstrated, it is an adequate basis for the adjudication, this Court should dismiss the petition as having been improvidently granted (*Wood* v. *Chesborough*, 228 U. S. 672, 676-680 [1913]; *West Chicago St. R. Co* v. *Illinois ex rel. Chicago*, 201 U. S. 506, 519-520 [1906]; *Chicago, B. & Q. R. Co.* v. *Illinois ex rel. Comrs.*, 200 U. S. 561, 580-581 [1906]).

C. The alleged Federal question lacks substantiality.

As has been stated, the petitioner seeks to reform or rescind an "Agreement of Adjustment" under which the respondent agreed to compensate her for the taking of part of her land under the power of eminent domain. The agreement was entered into in lieu of a judgment of the State Court of Claims, which would have ensued upon the prose-

cution of a claim in that Court, and was entered into pursuant to statutory authorization.[7]

The essence of the petitioner's complaint is that she agreed to accept a wholly inadequate sum as compensation for her claim. But the substantiality of her claim of violation of due process under the Federal Constitution can be no greater in the case of an agreement between the parties than it would be in the case of an award by the Court of Claims. This Court has held that as long as compensation is made or provided for, the amount of the compensation, as a purely *quantum* question, does not present a substantial Federal question (*Appleby* v. *Buffalo*, 221 U. S. 524, 531-533 [1911]; see also: *McCoy* v. *Union Elevated R. R. Co.*, 247 U. S. 354, 363 [1918]; *McGovern* v. *New York*, 229 U. S. 363, 371 [1913]; *Roberts* v. *New York City*, 295 U. S. 264, 277-278 [1935]).

POINT II

Assuming, *arguendo*, that this Court does possess the power to review the judgment of the Court below, the judgment should be affirmed because: (a) the State has not waived its immunity from suits in equity; (b) the suit is, in effect, a suit against the State by reason of the fact that the respondent is an instrumentality of the State engaged in an operation which is governmental in nature; and (c) alternative relief is available to the petitioner in the State's Court of Claims.

A. The State has not waived its immunity to suits in equity.

The authorities which establish this conclusion have been set forth in Point I, subd. A, *supra*.[8]

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[7] See Appendix, Highway Law § 347(12) *infra*, pp. 1a-2a.

[8] See pp. 6-11, *supra*.

B. The suit is, in effect, a suit against the State by reason of the fact that the respondent is an instrumentality of the State engaged in an operation which is governmental in character, and no statutory waiver has been enacted which would permit maintenance of the instant cause of action.

(1) *The New York State Thruway Authority is an instrumentality of the State.*

In 1942 the New York Legislature approved a plan for the New York State Thruway. Pursuant to Highway Law, Article XII-A (L. 1942, ch. 914) the Department of Public Works constructed several segments of the Thruway system prior to 1950. In March of 1950 a committee, appointed by the Governor, recommended the creation of an Authority with power to finance, construct and operate the Thruway. At the time of this report the State had already expended some $25,000,000 on the construction of the Thruway and it was the recommendation of the committee that the construction at State expense should continue until such time as the Authority could perfect plans for financing the project. In this connection the report of the committee pointed out that since the Authority would undertake to finance from revenues major highway improvements which would otherwise be a direct burden on the State, it was fitting and proper that the State undertake to support the obligations of the Authority with the State's credit. This would have the effect of lowering the interest rate and decreasing the required margin of prospective earnings necessary to attract investors in the bond market. The report recognized that such a guarantee would require a constitutional amendment and recommended such amendment. (Public Papers of Governor Thomas E. Dewey, 1950, pp. 623-628.)

On March 9, 1950, the Governor, in a message to the Legislature, recommended the creation of the Authority and the enactment of a constitutional amendment *permitting State guarantee of its bonds.*

The Thruway Authority was created by L. 1950, ch. 143, which added Title 9 (§§ 350-375) to Public Authorities Law, Article 2, and supplemented Highway Law, Article XII-A. The act provides that it shall be "a body corporate and politic constituting a public corporation," its members to be appointed by the Governor with the advice and consent of the Senate, and its corporate existence to continue so long as it has bonds outstanding. *Upon its termination "all its rights and properties shall pass to and be vested in the state"* (§ 352). It is provided that the purpose of the Authority is to construct, maintain and operate a thruway system for the benefit of the people of the State and to facilitate transportation and commerce, and *"the authority shall be regarded as performing a governmental function in carrying out its corporate purpose"* (§ 353).

The inter-relationship between the Authority and the various departments of the State is made clear in the Thruway Act. In the absence of assumption of jurisdiction by the Authority, the Superintendent of Public Works has all the powers to construct, maintain and operate all or any part of the Thruway system (§ 356). Even after the Authority has assumed jurisdiction the Superintendent of Public Works is required to furnish engineering services in connection with construction contracts let by the Authority, and such services and other work of construction, reconstruction and improvement by the superintendent must be carried on, generally, in the same manner and subject to the same provisions of law as apply to the construc-

tion and improvement of state highways (§ 359). At the request of the Authority the Superintendent of Public Works may take over maintenance and operation of all or any part of the System (§ 360). Real property necessary for the construction and operation of the Thruway is acquired for the Authority *in the name of the People of the State of New York* by the Superintendent of Public Works in accordance with the procedure provided in Highway Law § 347 (§ 358). Legal services are rendered to the Authority by the State Department of Law (§ 362) and the services of the State Department of Motor Vehicles are made available for the collection of annual fees for the use of the Thruway (§ 362). It is similarly provided that all other State officers, departments, boards, divisions and commissions shall render such services as are within their respective functions (§ 362). The provisions of the Civil Service Law are made applicable to the Authority (§ 354 [6]), and the statute authorizes the transfer of officers and employees from various departments of the State (§ 355). The Authority is required to make annual reports to the Governor, the Legislature, the Comptroller and the Director of the Budget (§ 363), and all monies of the Authority are paid to the Comptroller as its agent (§ 364). The annual reports of the Authority indicate that since its inception it has utilized the services of all of the foregoing departments, as well as of the Division of State Police and the State Division of Standards and Purchase.

The Authority has been given the right to possess and use the real property of the State for its corporate purposes (§ 357), and is specifically authorized to acquire and hold real property "*in the name of the state*" (§§ 354[4], 358, 358-a) but as has been stated, such real property is, in practice, acquired by the Superintendent of Public

Works under the provisions of the Highway Law which vest in the Court of Claims exclusive jurisdiction to determine the value of the property appropriated and the legal damages therefor. The Authority is empowered to make traffic rules and regulations which are to be enforced either by the State Police or by its own employees who shall be uniformed peace officers and who shall possess all the powers of a police officer (§ 361). The property of the Authority and its income and operations are *exempt from taxation* (§ 371).

The statute provides for the *guarantee by the State of the notes and bonds of the Authority* "to the extent authorized by the Constitution at the time of the issuance of notes or bonds" (§§ 366, 369). The same Legislature which enacted this statute adopted a resolution calling for the Amendment of the Constitution to authorize such a guarantee to the extent of $500,000,000. This resolution was passed for the second time in 1951 and adopted by the people at the general election in the Fall of 1951. The Authority has issued bonds and notes guaranteed by the State in the amount of $500,000,000.

Although the Act empowers the Authority "to sue and be sued" (§ 354[1]), jurisdiction is vested in the Supreme Court, Albany County, of an action by a trustee for the noteholders and bondholders against the Authority upon the specific causes therein set forth (§ 368). In 1954, prior to the time the Authority assumed control of the Thruway and began to operate it, the Legislature enacted the Public Authorities Law § 361-b (L. 1954, ch. 517, eff. April 7, 1954) which conferred upon the Court of Claims exclusive jurisdiction to hear and determine claims against the Authority for its tortious acts and those of its agents.

The foregoing clearly establishes the virtual identity of the State and the Authority. In fact, the identity has already been judicially recognized. In *Easley* v. *New York State Thruway Authority*, 1 N. Y. 2d 374, 135 N. E. 2d 572, 573 (1956), the Court said (p. 376):

> "The Thruway Authority is 'a body corporate and politic constituting a public corporation' (Public Authorities Law, § 352) which performs part of the work of the State Government in building and maintaining a highway. *It cannot be doubted that this Authority is an arm or agency of the State.*" (Emphasis added.)

In the case at bar the Court of Appeals reiterated its holding that the Thruway Authority is an arm or agency of the State (32-33).

(2) *The New York State Thruway Authority is engaged in an operation which is governmental in character.*

The New York Court of Appeals had occasion to pass squarely on the question of the immunity shared by agencies of the State carrying out governmental functions. In *Glassman* v. *Glassman*, 309 N. Y. 436, 131 N. E. 2d 721 (1956), Judge Fuld said (pp. 440-441):

> "Little argument is required to demonstrate that the Retirement System is the kind of state instrumentality that is clothed with the sovereign immunity of the state. It is engaged in an important governmental function, and providing retirement pensions, annuities and other employment benefits for its personnel, comparable to those received by the employees of private industry, certainly assists and promotes the efficient operation of the affairs of the state itself. The close relationship between the Retirement System and the state government is apparent throughout the Civil Service Law provisions which create and govern the affairs of the System. Thus, the State Comptroller is made its administrative head and trustee of

its several funds (§§ 52, 70, subd. b), the Attorney-General, its legal adviser (§ 53), and custody of its funds is placed in the charge of the Department of Taxation and Finance (§ 70, subd. d). The state, as an employer of members of the Retirement System, is obligated for the maintenance of various reserves and funds of the System, as well as for its expenses and the payment of all employee benefits (§ 67)."

All of the criteria which led the Court to find that the Retirement System was clothed with the sovereign immunity of the State are present in the instant case. The Authority "is engaged in an important governmental function". The close relationship between the Authority and the State government, as shown in sub-section 1 of this sub-point, *supra*, is apparent throughout the Public Authorities Law provisions which create and govern the affairs of the Authority.

Most importantly, the legal proposition has been definitely and clearly enunciated that the establishment, construction, and maintenance of highways is a primary governmental function. Thus, in *New Paltz, H. & P. Traction Co.* v. *Ulster County*, 202 App. Div. 234, 195 N. Y. Supp. 623 (3rd Dept., 1922), the Court said (p. 237):

> "*The construction, maintenance and control of highways is a governmental function.* For convenience of administration, counties and towns were organized and to them were delegated certain powers and duties well defined and limited by statute, among which are some duties in the construction, maintenance and control of highways, *in discharging which they are performing a governmental duty* and their officers acting therein are the agents of the public or the State." (Emphasis added.)

See, also: *Neddo* v. *State of New York*, 194 Misc. 379, 386, 85 N. Y. S. 2d 54 (Ct. Cl., 1948), aff'd. 275 App. Div.

492, 90 N. Y. S. 2d 650 (3rd Dept., 1949), affd. 300 N. Y. 533, 89 N. E. 2d 253 (1949).

The rule is almost universal in its application. In *Atkin* v. *Kansas*, 191 U. S. 207 (1903), this Court said (pp. 221-222):

> "The improvement of the Boulevard in question was a work of which the State, if it had deemed it proper to do so, could have taken immediate charge by its own agents; for it is one of the functions of government to provide public highways for the convenience and comfort of the people. Instead of undertaking that work directly, the State invested one of its governmental agencies with power to care for it. Whether done by the State directly or by one of its instrumentalities, the work was of a public, not private, character."

See, also, *Petty* v. *Tennessee-Missouri Bridge Commission*, 254 F. 2d 857, 859 (8th Cir., 1958), revd. on other grounds, 359 U. S. 275 (1959).[9]

In *Muszynski* v. *New Jersey Turnpike Authority*, 27 N. J. Super. 248, 99 A. 2d 326 (1953), a case involving an Authority which is virtually identical with the respondent in character, nature and powers, the Court said (p. 327):

> " 'The construction, maintenance and operation of highways, bridges and tunnels is one of the primary governmental functions of the states,' citing cases. [Reference is to *Miller* v. *Port of New York Authority*, 18 N. J. Misc. 601, 603, 15 A. 2d 262, 264.]
>
> The court held in substance in the *Miller* case, *supra*, that the Port of New York Authority was the *alter ego* of the State and there could be no recovery against it, except on the basis of the condemnation process where negotiations had failed. The case of *Miller* v. *Port of New York Authority*, *supra*, is here controlling. The legal status of the defendant here is in the same category as that of the Port of New York

[9] For discussion of this case, see subsec. I, *infra*, at pp. 35-36.

Authority in the *Miller* case, *supra. The Turnpike is the State's alter ego.*" (Emphasis added.)[10]

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[10] The universality of the rule is further evidenced by the following cases:

Cal.—Bettencourt v. *State*, 123 Cal. App. 2d 60, 266 P. 2d 201, 203 (1954); *Zeppi* v. *State*, 174 Cal. App. 2d 484, 345 P. 2d 33, 35-36 (1959).

Ind.—Wright v. *House*, 188 Ind. 247, 121 N. E. 433, 436 (1919).

Iowa—Iowa Ry. & Light Corp. v. *Lindsey*, 211 Iowa 544, 231 N. W. 461, 462 (1930).

Kan.—State ex rel. Arn v. *State Commission of Revenue and Taxation*, 163 Kan. 240, 181 P. 2d 532, 539 (1947).

La.—Hulin v. *Road Dist. No. 4, Parish of Vermilion*, 165 La. 443, 115 So. 650, 653 (1928).

Me.—State v. *Fuller*, 105 Me. 571, 75 Atl. 315, 317 (1909); *Grindell's Case*, 126 Me. 287, 138 Atl. 66, 67 (1927).

Md.—Winebrenner v. *Salmon*, 155 Md. 563, 142 Atl. 723, 725 (1928).

Minn.—Mace v. *Ramsey County*, 231 Minn. 151, 42 N. W. 2d 567, 569 (1950).

Mont.—State ex rel. State H'way Comm. v. *District Court*, 105 Mont. 44, 69 P. 2d 112, 117 (1937); *Sjostrum* v. *State H'way Comm.*, 124 Mont. 562, 228 P. 2d 238, 241 (1951).

N. H.—Grimes v. *Keenan*, 88 N. H. 230, 187 Atl. 100, 103 (1953).

N. J.—Buffington v. *Atlantic County*, 11 N. J. Misc. 443, 167 Atl. 527 (1933).

Ohio—City of Lakewood v. *Thormyer*, 154 N. E. 2d 777, 784 (Ct. of Com. Pleas, 1958), affd. 111 Ohio App. 403, 157 N. E. 2d 431 (1959).

Pa.—House v. *Pennsylvania Turnpike Commission*, 45 Pa. D. & C. 677, 679-682, 53 Dauph. Co. 38, 90 Pittsb. Leg. J. 328 (1942); *Valley Forge Gardens, Inc.* v. *Morrisey, Inc.*, 3 Pa. D. & C. 2d 164, 167-168 (1953); *Caputo* v. *Pennsylvania Turnpike Commission*, 103 Pittsb. Leg. J. 486, 487 (1955); *Greene County* v. *Center Tp.*, 305 Pa. 79, 157 A. 777, 778 (1931).

Tex.—Robison v. *Whaley Farm Corp.*, 120 Tex. 633, 37 S. W. 2d 714, 715 (1931).

Vt.—Stalbird v. *Town of Washington*, 106 Vt. 213, 172 Atl. 623, 624 (1934).

Va.—Sayre v. *Northwestern Turnpike Rd.*, 37 Va. 454, 456 (1839); *Almond* v. *Day*, 199 Va. 1, 97 S. E. 2d 824, 830 (1957).

Wis.—Muscoda Bridge Co. v. *Village of Muscoda*, 193 Wis. 457, 214 N. W. 435, 437 (1927).

Dispositive of this point, insofar as it has been specifically applied to the Thruway, is *Easley* v. *New York State Thruway Authority*, 1 N. Y. 2d 374, 135 N. E. 2d 572 (1956). In holding, as has been heretofore stated, that this Authority is undoubtedly an arm or agency of the State, the Court said (p. 376):

> "The Thruway Authority * * * performs part of the work of the State Government in building and maintaining a highway."

(3) *The New York State Thruway Authority is clothed with the State's immunity except with respect to such causes as have been expressly statutorily allowed.*

Since, obviously, the State can act only through its various departments, officers, agencies and other instrumentalities, suits against such officers and agencies are deemed actions against the State itself so that the same rule is applicable to such action as where the State is specifically named a defendant. (*Pauchogue Land Corp.* v. *Long Island State Park Commission*, 243 N. Y. 15, 152 N. E. 451 [1926]; *Switzer* v. *Commissioners*, 134 App. Div. 487, 119 N. Y. Supp. 383 [1st Dep't, 1909].)

In *Pauchogue Land Corp.* v. *Long Island State Park Commission*, *supra*, the Court said (p. 28):

> "The complaint does not state a cause of action against the Long Island State Park Commission nor against the members thereof as such. As against them the suit is against the State itself and cannot be maintained."

The principle has been invoked many times to bar suits brought against numerous and various types of officers, agents and instrumentalities of the State of New York.

(*Smith* v. *State of New York*, 227 N. Y. 405, 125 N. E. 841 [1920; Niagara Falls State Reservation Commission]; *Pauchogue Land Corp.* v. *Long Island State Park Commission, supra; Switzer* v. *Commissioners for Loaning Certain Moneys of the United States of the County of New York, supra; Kirkman* v. *Commissioners of Palisades Interstate Park*, 200 App. Div. 870, 193 N. Y. Supp. 60 [2nd Dep't, 1922]; *Dietrich* v. *Palisades Interstate Park Commission*, 114 Misc. 425, 187 N. Y. Supp. 454 [Sup. Ct., New York Co., 1921]; *The Onteora*, 298 Fed. 553 [S. D., N. Y. 1923; Palisades Interstate Park Commission].)

In *Glassman* v. *Glassman*, 309 N. Y. 436, 131 N. E. 2d 721 (1956), the Court of Appeals said (p. 440):

> "The doctrine of sovereign immunity from suit, rooted in the ancient common law, was originally based on the monarchical, semireligious tenet that 'the King can do no wrong'. (See Borchard, Government Liability in Tort, 34 Yale L. J. 1, 2; Borchard, Governmental Responsibility in Tort, 36 Yale L. J. 1, 17-41). In modern times, it is more often explained as a rule of social policy, which *protects the state against burdensome interference with the performance of its governmental functions and preserves its control over state funds, property and instrumentalities.* (See *United States* v. *Lee*, 106 U. S. 196, 206; see, also, Block, Suits against Public Officers and the Sovereign Immunity Doctrine, 59 Harv. L. Rev. 1060, 1061.) *The immunity extends as well to officers and agencies of the State engaged in carrying on its governmental functions, and a suit against such an officer or agency is regarded as one against the state itself.* (See, *e.g.*, *Psaty* v. *Duryea*, 306 N. Y. 413; *Breen* v. *Mortgage Comm.*, 285 N. Y. 425, 429-430; *Volk* v. *City of New York*, 284 N. Y. 279, 285-287). Most states today provide some remedy whereby individuals with claims against the government may seek redress (see Claims against the State in Minnesota; Report of the Subcommittee on Immunity of the State from Suit, 32

> Minn. L. Rev. 539, 545-556) and, in New York, the method has taken the form of a legislative waiver of the state's 'immunity from liability' in section 8 of the Court of Claims Act. The suits to which the state has thereby consented, however, must be brought in the Court of Claims and in accordance with the procedure outlined in the Act governing that court." (Emphasis added.)

Nor can there by any doubt that the State can clothe, with its own immunity, its subordinate instrumentalities, regardless of how "independent". Indeed it has generally been held that in the absence of some express waiver of immunity such bodies inherently partake of their parent's sovereign immunity. Thus, in *Matter of Brown* v. *Trustees of Hamptonburg School District*, 303 N. Y. 484, 104 N. E. 2d 866 (1954), the Court said (p. 488):

> "As an auxiliary or arm of the State Government a municipal corporation is possessed of the same immunity from suit at the hands of citizens as does the State."

And the Court continued (p. 489):

> "The right, then, of citizens to bring suit against a municipal corporation for alleged negligence in the performance of a governmental function, did not exist at common law. Furthermore, it was not in the past, nor is it at present, guaranteed by constitutional provision. The present rule, that the State and its municipal adjuncts are liable in negligence in the same manner as individuals or corporations, is statutory in origin. (Court of Claims Act, § 8; *Bernardine* v. *City of New York*, 294 N. Y. 361.) Manifestly, then, any such right granted is one which might have been withheld altogether by the Legislature. Accordingly, the right to bring suit against a municipality may be granted upon such conditions as the Legislature, in its wisdom, sees fit to impose."

Even more recently, and dealing specifically with the New York State Thruway Authority, the Court of Ap-

peals, in *Easley* v. *New York State Thruway Authority*, 1 N. Y. 2d 374, 135 N. E. 2d 572 (1956), said (pp. 376-377):

> "Since the State as sovereign may assert, waive, or condition at will immunity from suit for itself and its agents (see *Matter of Brown* v. *Board of Trustees of Hamptonburg School Dist.*, 303 N. Y. 484, 489), the Legislature could in creating the Thruway Authority have refused to waive immunity as to it and thus could have forbidden suits to be maintained against the Authority in any court or tribunal."

And at page 378 the Court said:

> "Because of sovereign immunity, none of the existing courts could have taken jurisdiction over such claims, unless the Legislature should so permit."

The respondent does not contend that it is generally immune from legal action. To the extent that the Legislature has expressly and specifically authorized suit against it, it is, of course, subject to such suits.[11]

Further than the explicit legislative subjection to suit, the immunity or lack of immunity of the Authority fol-

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[11] Thus, the following causes of action have been legislatively authorized:

(1) *Claim based upon appropriation*: exclusive jurisdiction in Court of Claims (Public Authorities Law § 358; Highway Law § 347 [13]).

(2) *Claim based upon tort*: exclusive jurisdiction in Court of Claims (Public Authorities Law § 361-b).

(3) *Claim for breach of contract relating to construction, reconstruction, improvement, maintenance, or operation*; exclusive jurisdiction in Court of Claims (Public Authorities Law § 361-b).

(4) *Action in Supreme Court, Albany County, by trustee of noteholders and bondholders*:

(a) Mandamus or other suit, action or proceeding at law or in equity to enforce all rights of the noteholders or bondholders;

(b) Suit upon such notes or bonds;

(c) Action or suit in equity to enjoin any acts or things which may be unlawful or in violation of the rights of the holders of such notes or bonds (Public Authorities Law § 368).

lows the immunity or lack of immunity of the State. (*Bloom* v. *Jewish Board of Guardians*, 286 N. Y. 349, 352, 353, 36 N. E. 2d 617 [1941]; *Matter of Brown* v. *Trustees, Hamptonburg School District*, 303 N. Y. 484, 488, 104 N. E. 2d 866 [1954]; *Gifford* v. *Whittemore*, 4 A. D. 2d 379 [3rd Dept., 1957].)

The petitioner's reference to NICHOLS' *Law of Eminent Domain* (3rd Ed., 1950, Vol. 3, p. 151) and the supporting Massachusetts case[12] involves the proposition that "Where * * * a release is obtained by fraud the owner of the land may have it voided." The proposition is, of course, a correct statement of the substantive rule that fraud renders a contract voidable at the instance of the injured party. But it is quite irrelevant to the issue herein. Here the issue is not whether or not there is a substantive foundation for an action based on fraud, but rather, conceding, *arguendo*, the existence of such a cause of action, whether or not the respondent is amenable to an action for rescission based upon the fraud.

Since, as has been demonstrated, the State has not waived its immunity from suits in equity, it follows that such a suit may not be maintained against the respondent. Although the respondent may be sued for money damages upon statutorily authorized causes in the State Court of Claims, it is not, in the performance of its governmental functions, subject to coercion, mandate or adjudication under equity decrees.

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[12] Page 27 of petitioner's brief.

(4) *The statutory power "to sue and be sued," conferred upon the New York State Thruway Authority, does not detract from its immunity.*

The provision of Public Authorities Law § 354(1) that the Authority shall have power "to sue and be sued" does not destroy the respondent's immunity. In *Glassman* v. *Glassman*, 309 N. Y. 436, 131 N. E. 2d 721 (1956), the Court said (p. 441):

> "Instead, she [*i.e.*, the plaintiff] urges that immunity should be denied the System because, first, she has no other remedy, since the Court of Claims would have no jurisdiction over either an equitable action of this kind (*cf. Psaty* v. *Duryea, supra*, 306 N. Y. 413, 416-417) or the person of the individual defendant and, second, the System enjoys the powers and privileges of a corporation and, therefore, 'must also accept the responsibilities of a corporation' and be amenable to the jurisdiction of a court of equity. In our view, neither of these contentions can assist plaintiff; the immunity of a state agency is in no way affected by the lack of any other remedy (see *Psaty* v. *Duryea, supra*, 306 N. Y. 413, 419-420; *Buckles* v. *State of New York*, 221 N. Y. 418, 423-424) or by the fact that the agency is endowed with the powers and privileges of a corporation. (See, *e.g.*, *Breen* v. *Mortgage Comm.*, *supra*, 285 N. Y. 425, 430; *Matter of Hicka*, 180 Misc. 173, 175-176; *Arkansas* v. *Texas*, 346 U. S. 368, 370.)"

The Courts have consistently refused to construe the power to sue and be sued as a general waiver of immunity. In *Breen* v. *Mortgage Commission*, 285 N. Y. 425, 431, 35 N. E. 2d 25 (1941), the Court held that there was no jurisdiction of the Mortgage Commission and the Mortgage Commission Servicing Corporation, notwithstanding their power to sue and be sued and notwithstanding the corporate capacity of the latter, reiterating the principle that "Statutes in derogation of the sovereign immunity of the

State to suit are strictly construed. (*Smith* v. *State*, 227 N. Y. 405, 410.)" See also *Lacock* v. *City of Schenectady*, 224 App. Div. 512, 231 N. Y. Supp. 379 (3rd Dept., 1928), aff'd 251 N. Y. 575 (1929); *Beldon* v. *Mortgage Commission*, 173 Misc. 731, 19 N. Y. S. 2d 112 (Sup. Ct., New York Co., 1940); *Smith* v. *State of New York*, 227 N. Y. 405, 408, 409-410, 125 N. E. 841 (1920); *Dietrick* v. *Palisades Interstate Park Comm.*, 114 Misc. 425, 429, 187 N. Y. Supp. 454 (Sup. Ct., New York Co., 1921).

In *The Onteora*, 298 Fed. 553 (S. D. New York, 1923), Judge LEARNED HAND said (p. 554):

> "The libelant's argument is that the corporate form given to the claimants (Palisades Interstate Park Commission), together with their express subjection to suit, shows an intention to make them generally liable like a municipality, and that municipalities, except in their governmental functions, are liable as tort-feasors. *Missano* v. *Mayor*, 160 N. Y. 123, 54 N. E. 744; *Gartland* v. *N. Y. Zoological Society*, 135 App. Div. 103, 120 N. Y. Supp. 24. But the distinction in respect of municipalities has never been applied to a state, which can be made liable only when it has given an express consent. Moreover, the claimants are not a municipality, as I have said, though a 'body politic.' Besides, the argument that consent to be sued carried by implication the recognition of a liability in tort was met and denied in *Smith* v. *State*, *supra*. I can see no valid distinction whether the proposed defendant be the state itself or a state agency."

It is conceded that the *Federal* rule, when dealing with a *Federal* corporation or agency, construes the "sue and be sued" clause as a waiver of immunity (*Keifer & Keifer* v. *Reconstruction Finance Corp.*, 306 U. S. 381 [1939]). Nevertheless, the Federal Courts, where suit is brought against an entity which is a mere arm or agency of the State, or merely a channel through which the State per-

forms part of its necessary governmental functions, or completely identified with the State in the performance of its public functions, have held that the suit is one against the State and, under the Eleventh Amendment, not within the jurisdiction of a Federal Court (*Kansas City Bridge Co.* v. *Alabama State Bridge Corp.*, 59 F. 2d 48, 49, 50 [5th Cir., 1932]; *Fowler* v. *California Toll-Bridge Authority*, 128 F. 2d 549 [9th Cir., 1942]; *Broadwater-Missouri Water Users' Assn.* v. *Montana Power Co.*, 139 F. 2d 998, 1000-1001 [9th Cir., 1944]; *Wexler* v. *Janney*, 177 F. 2d 808 [4th Cir., 1949]; *Dunnuck* v. *Kansas State Highway Comm.*, 21 F. Supp. 882 [D. C. Kansas, 1937]; *Chicago Stadium Corp.* v. *State of Indiana*, 123 F. Supp. 783 [S. D. Indiana, 1954], reversed and remanded on other grounds 220 F. 2d 797 [7th Cir., 1955]).

During the most recent consideration of this question by this Court—*Petty* v. *Tennessee-Missouri Comm.*, 359 U. S. 275 (1959)—on the assumption that the suit "must be considered as one against the States since this bi-state corporation is a joint or common agency of Tennessee and Missouri" (p. 279), the Court interpreted the "sue and be sued" clause under the Federal rule because the corporation was created by an interstate compact which had to receive the approval of Congress and, therefore, the resolution of the question of sovereign immunity was held to require the application of Federal, not State law (p. 280). Actually, the view that a bi-state agency, much less the agency of a single State, was not immunized from suit, was held by only three members of the Court. On the question of the applicability of State law, rather than Federal law, to the sovereign immunity asserted by the bi-state agency involved in *Petty*, three members of the Court[13]

[13] Chief Justice Warren and Justices Douglas and Brennan.

held for application of the Federal rule, three members[14] concurred in the judgment and opinion of the Court, but did not reach the question whether the Eleventh Amendment immunizes from suit agencies created by two or more States under State compacts which the Constitution requires to be approved by the Congress, and three members[15] dissented, upholding the view that State law should be applied to the question. Mr. Justice FRANKFURTER said (pp. 283-284):

> "The Court of Appeals below held that in neither Missouri nor Tennessee would the language 'sue and be sued' render a public corporation liable for suit in tort. 254 F. 2d 857. Three times during this Term the Court followed its settled practice in dealing with a doubtful state statute by deferring to interpretations of local law rendered by the lower federal courts. [Citing *Sims* v. *United States*, 359 U. S. 108; *The Tungus* v. *Skovgaard*, 385 U. S. 588; *United Pilots Assn.* v. *Hallecki*, 358 U. S. 613.] We should not now disregard this settled practice but should accept the interpretation of Missouri and Tennessee law as found by the Court of Appeals for the Eighth Circuit."

The petitioner points to *United States* v. *Lee*, 106 U. S. 196 (1882), as exemplifying a constitutional exception to the doctrine of sovereign immunity, but this Court held in *Larson* v. *Domestic & Foreign Corp.*, 337 U. S. 682 (1949), that even under the Federal rule the waiver of immunity was up to Congress, and that though Congress may have permitted suits for money damages against a Federal corporate entity, it had not permitted an equitable suit for an injunction. The Court said (pp. 704-705):

> "It is argued that a sales agency, such as the War Assets Administration, is not the type of agency which

[14] Justices BLACK, CLARK and STEWART.

[15] Justices FRANKFURTER, HARLAN and WHITTAKER.

> requires the protection from direct judicial interference which the doctrine of sovereign immunity confers. We do not doubt that there may be some activities of the Government which do not require such protection. There are others in which the necessity of immunity is apparent. But it is not for this Court to examine the necessity in each case. That is a function of the Congress. The Congress has, in many cases, entrusted the business of the Government to agencies which may contract in their own names and which are subject to suit in their own names. In other cases it has permitted suits for damages, but, significantly, not for specific relief, in the Court of Claims. The differentiations as to remedy which the Congress has erected would be rendered nugatory if the basis on which they rest—the assumed immunity of the sovereign from suit in the absence of consent—were undermined by an unwarranted extension of the *Lee* doctrine."

In the dissenting opinion, Mr. Justice FRANKFURTER, in classifying the earlier cases dealing with the question of sovereign immunity where a State agency or officer was involved, classified the cases in which a plaintiff suffers a legal detriment through action of an officer who has exceeded his statutory authority (p. 710 n. 4; pp. 731-732). These cases justified recovery, but even here the Justice said (p. 716):

> "And if the relief necessarily implicates a resort to State funds the State becomes an indispensible party and without its consent the suit must fail. See *Louisiana* v. *McAdoo* [234 U. S. 627], *supra*; *Lankford* v. *Platte Iron Works*, 235 U. S. 461."

It is pertinent in this connection to observe that not only is title to the real property of the Thruway Authority presently held in the name of the State of New York (Public Authorities Law §§ 354[4], 358, 358a), but all of its property must ultimately be vested in the State (Public

Authorities Law § 352), and the latter is authorized to, and has guaranteed, payment of the Authority's bonds and notes (Public Authorities Law § 366).

C. The petitioner is not entitled to equitable relief in any event because adequate alternative relief at law is available in the State's Court of Claims.

The petitioner's allegation of "no adequate remedy at law" (15, 16) is legally untenable because the facts alleged by her establish a cause of action for deceit, a tort which may be the subject of a claim in the State Court of Claims (Public Authorities Law § 361-b). However, despite the fact that the New York Supreme Court is a Court of general jurisdiction in law and equity, the Legislature, pursuant to constitutional authorization, has vested the Court of Claims with *exclusive* jurisdiction of actions against the Authority which sound in tort (Public Authorities Law § 361-b).[16]

Furthermore, the petitioner is authorized to sue in the Court of Claims on its original claim which arose out of

[16] The petitioner's statement (Brief, p. 13) that money damages can be awarded by the State Supreme Court under the omnibus relief clause in her complaint (16) is without legal foundation, except as to an action brought by the trustee of the noteholders and bondholders. (See footnote 11 on page 31, *supra*.) *Panless* v. *Saratoga Springs Authority*, 255 App. Div. 426, 8 N. Y. S. 2d 103 (3rd Dept., 1938) and *Strang* v. *State*, 206 Misc. 734, 134 N. Y. S. 2d 871 (Ct. Cl., 1954), cited by the petitioner in support of the statement that New York's Supreme Court has jurisdiction over the Thruway Authority, deals with a rule of jurisdiction which is obsolete, not because the Court of Appeals ruled to the contrary in the case at bar, but because subsequent to those decisions the Legislature conferred exclusive jurisdiction upon the Court of Claims and withdrew the jurisdiction of the Supreme Court. The legislative change was, of course, recognized by the Court of Appeals in the case at bar.

the appropriation of her property (Public Authorities Law § 358; Highway Law § 347[13]) and in this case, too, the jurisdiction of the Court of Claims is exclusive. The respondent, of course, may interpose the Agreement of Adjustment by way of avoidance, and may request the Court to render an award in the amount which has been agreed upon in the Agreement of Adjustment. In such action the petitioner would be in a position, and it would be her burden, to allege and prove the invalidity of the Agreement on whatever legal grounds she chose. The Court of Claims has jurisdiction to grant incidental equitable relief as part of its omnibus jurisdiction respecting claims. See, for examples: *Morey* v. *State of New York*, 283 App. Div. 562, 129 N. Y. S. 2d 27 (3rd Dept., 1954); *Menna* v. *State of New York*, 10 A. D. 2d 753, 197 N. Y. S. 2d 528 (3rd Dept., 1960); *Amity Operating Co.* v. *State of New York*, 207 Misc. 830, 140 N. Y. S. 2d 789 (Ct. Cl., 1955).

There is nothing either in the State statutes or decisions which requires a claimant in an appropriation case to first cause an "Agreement of Adjustment" to be judicially cancelled as a condition precedent to the filing in the Court of Claims of a claim based upon the appropriation.

It follows that (1) the New York Supreme Court has no jurisdiction of the remedy which is available to the petitioner, and (2) the existence of the remedy defeats the petitioner's cause of action even if the question of immunity is disregarded.

However, the petitioner emphasizes the fact that the Court of Appeals found that she is without a remedy, but that the absence of a remedy does not affect the right of the State or a State agency to assert its immunity. Although, as has been shown, the petitioner did have a right

to prosecute her original claim upon the appropriation, the fact of the matter is that her cause of action has been barred by the statute of limitations.[17] This, of course, was necessarily the basis of the Court's statement that the petitioner was without a remedy. Nevertheless, it must be observed that the possessor of a statutorily-barred claim at law cannot thus qualify for equitable relief on the basis of the self-induced loss. Furthermore, the statute of limitations does not necessarily effect a bar to the claim. The petitioner is still free to petition the Legislature for an enabling act to permit the revival of the claim and its prosecution in the Court of Claims.

Thus, in the last analysis, although the absence of a remedy does not bar the respondent's right to assert its immunity, the presence of the remedy effectively bars the petitioner's suit for equitable relief.

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[17] The New York Court of Claims Act § 10(1) provides for a period of two years within which claims must be filed.

CONCLUSION

The petition for a writ of certiorari should be dismissed, as having been improvidently granted; or the judgment of the Court below should be affirmed.

Dated: Albany, New York, December 22, 1961.

Respectfully submitted,

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Appendix

U. S. Constitution, Amendment XI

"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by Citizens or Subjects of any Foreign State."

Amendment XIV

"* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *."

N. Y. Highway Law

"§ 347. *Property for state thruways, bridges thereon, and other thruway uses and purposes to be acquired by appropriation*

* * *

12. Claims for the value of the property appropriated and for legal damages caused by any such appropriation where not otherwise specifically provided for in this section may be adjusted by the superintendent of public works even though a claim has been filed with the court of claims, if the amount thereof can be agreed upon with the owner or owners thereof. If the amount of a claim cannot be agreed upon, the superintendent of public works may enter into an agreement with the owner or owners providing for payment of an amount equal to sixty percent of the amount determined by the superintendent to be the value of such claim reserving to such owner or owners, however, the right to file such claim with the court of claims or if a claim has been filed reserving the right to prosecute said claim. The reservation of the right to file said claim in the court of claims shall not extend or affect in any way the time limited for the filing of such claim as provided for in the court of claims act. Upon making any such agreement the superintendent of public works shall deliver to the comptroller

such agreement and a certificate stating the amount due such owner thereunder on account of such appropriation of his property and the amount so fixed shall be paid out of the state treasury from moneys appropriated for the construction, reconstruction and maintenance of state thruways and bridges thereon, but not until there shall have been filed with the comptroller a certificate of the attorney general showing the person or persons claiming the amount so agreed upon to be legally entitled thereto.

13. Any owner may present to the court of claims a claim for the value of such property appropriated and for legal damages, as provided by law for the filing of claims with the court of claims. Awards and judgments of the court of claims shall be paid in the same manner as awards and judgments of that court for the acquisition of lands generally and shall be paid out of the state treasury from moneys appropriated for the construction, reconstruction and maintenance of state thruways and bridges thereon."

N. Y. Public Authorities Law—Title 9

"*§ 352. New York state thruway authority*

1. A board to be known as 'New York state thruway authority' is hereby created. Such board shall be a body corporate and politic constituting a public corporation. It shall consist of three members appointed by the governor by and with the advice and consent of the senate.

• • •

4. Such board and its corporate existence shall continue so long as it shall have notes, bonds or other obligations outstanding (including notes, bonds or obligations hereafter issued or incurred) and until its existence shall be terminated by law. Upon the termination of the existence of the authority, all its rights and properties shall pass to and be vested in the state."

Appendix

"§ 353. *Purposes of the authority and benefits therefrom*

The authority is created to and shall have power to construct, reconstruct, improve, maintain or operate a thruway system as provided by this title together with facilities for the public incidental thereto. It is hereby found and declared that such purposes are in all respects for the benefit of the people of the state of New York for the increase of their pleasure, convenience and welfare, for the improvement of their health, to facilitate transportation for their recreation and commerce and for the common defense; and the authority shall be regarded as performing a governmental function in carrying out its corporate purpose and in exercising the powers granted by this title."

"§ 354. *Powers of the authority*

Except as otherwise limited by this title, the authority shall have power

1. To sue and be sued;

2. To have a seal and to alter the same at pleasure;

3. To acquire, hold and dispose of personal property for its corporate purposes;

4. To acquire and hold in the name of the state by purchase or appropriation real property or rights or easements therein and to sell, exchange, or otherwise dispose of any real property not necessary for its corporate purposes or whenever the board shall determine that it is in the interest of the authority;

• • •

6. To appoint officers, agents and employees and fix their compensation; subject however to the provisions of the civil service law, which shall apply to the authority as a municipal corporation other than a city;

7. To make contracts, and to execute all instruments necessary or convenient;"

Appendix

"§ 355. *Officers and employees; transfer, promotion and seniority*

1. Officers and employees of state departments and agencies may be transferred to the authority and officers and employees of the authority may be transferred to state department and agencies without examination and without loss of any civil service status or rights. No such transfer may, however, be made except with the approval of the head of the state department or division involved and the director of the budget and the chairman of the authority and in compliance with the rules and regulations of the state civil service commission.

2. Promotions from positions in state departments and agencies to positions in the authority, and vice versa, may be made from interdepartmental promotion lists resulting from promotion examinations in which both employees of the authority and employees of the state are eligible to participate.

3. In computing seniority for purposes of promotion or for purposes of suspension or demotion upon the abolition of positions in the service of the authority or in the service of the state, in the case of an employee of the authority a period of prior employment in the service of the state shall be counted in the same manner as though such period of employment had been in the service of the authority, and in the case of an employee of the state a period of prior employment in the service of the authority shall be counted in the same manner as though such period of employment had been in the service of the state. For the purposes of the establishment and certification of preferred lists, employees suspended from the authority shall be eligible for reinstatement in the service of the state, and employees suspended from the service of the state shall be eligible for reinstatement in the service of the authority, in the same manner as though the authority were a department of the state."

Appendix

"§ 356. *Thruway sections and connections; assuming jurisdiction*

At any time after this title shall become effective the authority may adopt a resolution assuming jurisdiction for its corporate purposes of any or all of the thruway sections or connections below described and such connections with highways, hereinafter referred to as 'highway connections', as the authority may deem advisable in the interest of the public to serve traffic needs, and the authority shall continue to have such jurisdiction so long as its corporate existence shall continue.

Pending the adoption of such resolution, the superintendent shall have all the powers herein conferred upon the authority to construct, reconstruct, improve, maintain, and operate such thruway sections and connections, and highway connections, and to acquire in the name of the state real property therefor."

"§ 357. *Right of authority to use state property; payment for improvements*

1. On assuming jurisdiction of a thruway section or connection or any part thereof, or of a highway connection, the authority shall have the right to possess and use for its corporate purposes so long as its corporate existence shall continue, any real property and rights in real property theretofore acquired by the state, including all improvements thereon and state canal lands and properties; provided that the use by the authority of canal lands and properties shall not interfere with the use thereof for canal purposes."

"§ 358. *Acquisition of real property by the superintendent*

1. On assuming jurisdiction of a thruway section or connection or any part thereof, or of a highway connection, the authority may from time to time determine what real property is necessary for the construction, improvement and operation thereof, in addition to real property theretofore acquired by the state,

If funds are made available by the authority for payment of the cost and expense of the acquisition thereof, the superintendent when requested by the authority shall acquire such real property in the name of the state by appropriation, and, where necessary, remove the owner or occupant thereof and obtain possession according to the procedure provided by section three hundred forty-seven of the highway law. The authority shall have the right to possess and use for its corporate purposes so long as its corporate existence shall continue all such real property and rights in real property so acquired.

2. Claims for the value of the property appropriated and for legal damages caused by any such appropriation shall be adjusted and determined by the superintendent with the approval of the authority, or by the court of claims as provided in said section three hundred forty-seven. When a claim has been filed with the court of claims, the claimant shall cause a copy of such claim to be served upon the authority and the authority shall have the right to be represented and heard before said court. All awards and judgments arising from such claims shall be paid out of moneys of the authority."

"*§ 358-a. Acquisition of real property by the authority*

On assuming jurisdiction of a thruway section or connection or any part thereof, or of a highway connection, the authority may from time to time determine what real property is necessary for the construction, improvement and operation of such thruway section or connection or part thereof, or of a highway connection, in addition to real property acquired or to be acquired by the state, and thereupon may acquire such real property by condemnation pursuant to the condemnation law. The authority may also, and in any case, acquire real property in the name of the state by deed and may pay such price therefor as shall be agreed with the owner thereof."

"§ *359. Construction, reconstruction and improvement*

• • •

2. All construction, reconstruction and improvements and any engineering work required in connection therewith which are performed on behalf of the authority by the superintendent shall be carried on, generally, in the same manner and subject to the same provisions of law as apply to the construction and improvement of state highways."

"§ *360. Operation and maintenance*

Operation and maintenance by the authority of any thruway section or connection or any part thereof or of a highway connection of which it has assumed jurisdiction shall be performed (a) by the use of authority forces and equipment; (b) by contract with municipalities or independent contractors; (c) at the request of the authority, by the superintendent and his subordinates in the department of public works as agents for, and at the expense of the authority, or (d) by a combination of such methods."

"§ *361. Traffic control*

1. (a) In addition to the powers conferred by the vehicle and traffic law, the authority is hereby authorized to promulgate such rules and regulations for the use and occupancy of the thruway as may be necessary and proper for the public safety and convenience, for the preservation of its property and for the collection of tolls.

• • •

2. Enforcement of the rules and regulations of the thruway authority and of those provisions of the vehicle and traffic law applicable to the thruway shall be by authority forces, provided, however, that at the request of the authority, such enforcement shall be the duty of the division of state police. Violators shall be apprehended and prosecuted in the same manner as

provided for the apprehension and prosecution of violators of the vehicle and traffic law who commit violations thereof upon the state highway system. Authority forces employed for the enforcement of such rules and regulations, during the term of such employment, shall be uniformed, shall be peace officers, as defined by section one hundred fifty-four of the code of criminal procedure, and shall have, within the limits of any municipality within which any portion of the thruway system under the jurisdiction of the authority shall be located, all the powers of a constable, marshal, sheriff, police constable or policeman of a municipality in the execution of criminal processes; and criminal process issued by any court or magistrate of a municipality within which any portion of the thruway system under the jurisdiction of the authority shall be located, may be directed to and executed by any such employee notwithstanding the provisions of any local or special law, ordinance or regulation."

"§ *361-b. Jurisdiction in certain suits against the authority*

Exclusive jurisdiction is hereby conferred upon the court of claims to hear and determine the claims of any person against the authority (a) for its tortious acts and those of its agents, and (b) for breach of a contract relating to construction, reconstruction, improvement, maintenance or operation, in the same manner and to the extent provided by and subject to the provisions of the court of claims act with respect to claims against the state, and to make awards and render judgments therefor. All awards and judgments arising from such claims shall be paid out of moneys of the authority."

"§ *362. Assistance by state officers, departments, boards, divisions and commissions*

At the request of the authority, engineering and legal services for such authority shall be performed by forces or officers of the department of public works and the department of law respectively, and all other

state officers, departments, boards, divisions and commissions shall render services within their respective functions. At the request of the authority, services in connection with the collection of annual fees for the use of the thruway or any part thereof by motor vehicles shall be performed by the department of taxation and finance through the bureau of motor vehicles."

"§ *363. Annual report*

The authority shall submit to the governor, to the legislature, to the comptroller and to the director of the budget on or before the first day of February of each year a detailed report setting forth its operations and fiscal transactions during the preceding calendar year with a statement of its financial condition as of the end of such year and a statement of all receipts and expenditures during such year."

"§ *364. Deposit and investment of moneys of the authority*

All moneys of the authority from whatever source derived shall be paid to the comptroller as agent of the authority, who shall not commingle such moneys with any other moneys.

* * *

The comptroller and his legally authorized representatives are hereby authorized and empowered from time to time to examine the accounts and books of the authority, including its receipts, disbursements, contracts, leases, sinking funds, investments and any other matters relating to its financial standing.

Notwithstanding the provisions of this section, the authority shall have power, subject to the approval of the comptroller, to contract with the holders of any of its notes or bonds as to the custody, collection, securing, investment and payment of any moneys of the authority, or any moneys held in trust or otherwise for the payment of notes or bonds or in any way

to secure notes or bonds, and to carry out any such contract.

• • •

Moneys of the authority not required for immediate use may, in the discretion of the authority, be invested by the comptroller in obligations of the United States government or of the state of New York.

Subject to agreements with noteholders and bondholders and the approval of the comptroller, the authority shall prescribe a system of accounts."

"§ *366. Guaranty by the state*

1. To the extent authorized by the constitution at the time of the issuance of notes or bonds, the punctual payment of the notes and bonds shall be, and the same hereby is, fully and unconditionally guaranteed by the state, both as to principal and interest, according to their terms; and such guaranty shall be expressed upon the face thereof by the signature or facsimile signature of the comptroller or a deputy comptroller. In the event that the authority shall fail to pay when due, the principal of, or interest on, the notes or bonds, the comptroller shall pay the holder thereof, and thereupon the state shall be subrogated to the rights of the noteholders or bondholders so paid."

"§ *368. Remedies of noteholders and bondholders*

1. In the event that the authority shall default in the payment of principal of or interest on any issue of notes or bonds after the same shall become due, whether at maturity or upon call for redemption, and such default shall continue for a period of thirty days, or in the event that the authority shall fail or refuse to comply with the provisions of this title, or shall default in any agreement made with the holders of any issue of notes or bonds, the holders of twenty-five per centum in aggregate principal amount of the notes or bonds of such issue then outstanding, by instrument or instruments filed in the office of the clerk of the county of Albany and proved or acknowledged in the

same manner as a deed to be recorded, may appoint a trustee to represent the holders of such notes or bonds for the purposes herein provided.

2. Such trustee may, and upon written request of the holders of twenty-five per centum in principal amount of such notes or bonds then outstanding shall, in his or its own name

(a) by mandamus or other suit, action or proceeding at law or in equity enforce all rights of the noteholders or bondholders, including the right to require the authority to collect fees, rentals and charges adequate to carry out any agreements with the holders of such notes or bonds and to perform its duties under this title;

(b) bring suit upon such notes or bonds;

(c) by action or suit in equity, require the authority to account as if it were the trustee of an express trust for the holders of such notes or bonds;

(d) by action or suit in equity, enjoin any acts or things which may be unlawful or in violation of the rights of the holders of such notes or bonds;

(e) declare all such notes or bonds due and payable, and if all defaults shall be made good then with the consent of the holders of twenty-five per centum of the principal amount of such notes or bonds then outstanding, to annul such declaration and its consequences; provided, however, that this clause (e) shall not be applicable in the case of notes or bonds guaranteed by the state."

"§ *369. Liability of state*

The state shall be liable on notes or bonds guaranteed hereunder but shall not be liable on notes or bonds not guaranteed by the state which shall not be a debt of the state."

"§ *371. Tax exemption*

The property of the authority and its income and operations shall be exempt from taxation."

SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

October Term, 1961

No. 234

MARIE BENZ,
Petitioner,

vs.

NEW YORK STATE THRUWAY AUTHORITY,
Respondent.

PETITIONER'S REPLY BRIEF

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IN THE

Supreme Court of the United States

October Term, 1961

No. 234

MARIE BENZ,

Petitioner,

vs.

NEW YORK STATE THRUWAY AUTHORITY,

Respondent.

PETITIONER'S REPLY BRIEF

Petitioner makes the following supplementary points in reply to respondent's brief.

I.

A.

The respondent contends first that the decision in the Court below was based on sovereign immunity and, as such, is a non-federal ground which is adequate for a dismissal of petitioner's writ. This argument, however, (as we pointed out in our reply to respondent's brief in opposition to the writ) begs the question which is presented for decision in this case.

The facts in the case at bar establish a violation by the respondent of the just compensation provisions of the

Fourteenth Amendment. The question before the Court, therefore, is whether the doctrine of sovereign immunity permits a state to violate with impunity the injunctions of the Fourteenth Amendment.

On page 9 of respondent's brief, counsel quotes from *Georgia Ry. v. Decatur*, 262 U. S. 432, 43 S. Ct. 613, 67 L. Ed. 1065 (1923) to the effect that the determination of the Georgia Supreme Court is binding upon the United States Supreme Court. In the very next sentence, however, the Court went on to say that it would determine the constitutional questions for itself, and, in fact, did strike down the determination of the State Court which it found to be in violation of the Federal Constitution.

Thus, in *Backus v. Fort Street Union Depot Co.*, 169 U. S. 557, 18 S. Ct. 445, 42 L. Ed. 853, (1897), the Court said (169 U. S. at page 565, 18 S. Ct. at page 448):

> "It is also not open to further debate, since the decision in *Chicago, Burlington and Quincy Railroad v. Chicago*, 166 U. S. 226, that this court may examine proceedings had in a state court, under state authority, for the appropriation of private property to public purposes, so far as to inquire whether that court prescribed any rule of law in disregard of the owner's right to just compensation."

It is the petitioner's contention that the interposition of the doctrine of sovereign immunity, which results in the petitioner receiving an admittedly unjust compensation for her property, is such an action by the State Court. (We say "admittedly" because, for the purpose of this proceeding, the allegation that petitioner was to receive only one-twentieth of the true value of her property must be accepted as true.)

Respondent does not cite a single case which holds that sovereign immunity is an adequate non-federal ground for

denying jurisdiction where such a decision resulted in the deprivation of some right guaranteed by the Fourteenth Amendment. Furthermore, respondent recognizes a limitation on the State Court's right to administer the law according to its own interpretation to the extent that, "some right, title, immunity or privilege, Federally created, has been asserted and denied". (Page 11 of respondent's brief.) This is further emphasized by the first words of the quotation from *Erie Railroad v. Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938), cited on page 10 of respondent's brief, *viz.*, "Except in matters governed by the Federal Constitution • • •" Respondent, furthermore, recognizes under Point B on page 14 of its brief, the assertion by petitioner of a Federally created right under the Fourteenth Amendment. Petitioner has, therefore, raised a substantial Federal question.

B.

On page 14 of the respondent's brief there appears an assertion to the effect that the United States Supreme Court has previously determined that sovereign immunity overrides the "due process" provision of the Fourteenth Amendment.

The cases cited by respondent in support of this contention (on pages 14 and 15 of its brief) not only do not support this statement, but respondent itself concedes (on page 15) that "sovereign immunity is no defense to a taking under eminent domain."—a right which would be asserted against a State under the Fourteenth Amendment. The only case cited by the respondent in support of its contention which even mentions the Fourteenth Amendment is *Palmer v. Ohio*, 248 U. S. 32, 39 S. Ct. 16, 62 L. Ed. 108 (1918), where the Court stated that it had

been mentioned only "vaguely and indefinitely" and consequently was not even considered by the Court in arriving at its decision.

Counsel for respondent, while conceding that sovereign immunity is not a defense to a taking under the power of eminent domain, attempts to maintain that petitioner's "lawsuit does not involve the taking of property without the payment of just compensation" (Page 15 of respondent's brief). Respondent contends that since this is an action for rescission or reformation, the subject of the contract is irrelevant (Page 16 of respondent's brief).

Respondent thus misconceives the entire nature of the petitioner's claim. The subject matter of the contract is land which was appropriated by the respondent from the petitioner without any provision for compensation being made. There is no question that property may be taken prior to the payment of compensation, provided adequate provision for the payment of just compensation is made. *Backus v. Fort Street Union Depot Co.*, 169 U. S. 557, 565, 18 S. Ct. 445, 42 L. Ed. 853 (1897).

After the property had been taken, a duty then devolved upon the respondent under the Fourteenth Amendment to provide just compensation to the petitioner for the property taken. In *Chicago, B. & Q. Ry. Co. v. Chicago*, 166 U. S. 226, 17 S. Ct. 581, 41 L. Ed. 979 (1897), the Court, quoting from *Scott v. Toledo*, 36 Fed. Rep. 385, said (166 U. S. at pages 238-239, 41 L. Ed. at page 985):

> "After full consideration that able judge said: 'Whatever may have been the power of the States on this subject prior to the adoption of the Fourteenth Amendment to the Constitution, it seems clear that, since that amendment went into effect, such limitations and restraints have been placed upon their power in dealing with individual rights that the State

cannot now lawfully appropriate private property for the public benefit or to public uses without compensation to the owner; and that any attempt so to do, whether done in pursuance of a constitutional provision or legislative enactment, whether done by the legislature itself *or under delegated authority by one of the subordinate agencies of the State*, and whether done directly, by taking the property of one person and vesting it in another or the public, or indirectly through the forms of law, by appropriating the property and requiring the owner thereof to compensate himself, or to refund to another the compensation to which he is entitled, would be wanting in that "due process of law" required by said Amendment. The conclusion of the court on this question is, that since the adoption of the Fourteenth Amendment compensation for private property taken for public uses constitutes an essential element in "due process of law," *and that without such compensation the appropriation of private property to public uses, no matter under what form of procedure it is taken, would violate the provisions of the Federal Constitution.*' " (Emphasis supplied.)

The compensation must be agreed upon or determined by judicial inquiry, (166 U. S. at page 240, 41 L. Ed. at page 986), and must be a "fair and full equivalent for the thing taken from him by the public." (166 U. S. at pages 241, 242, 41 L. Ed. 986); *Chicago B. & Q. Ry. v. State of Illinois ex rel. Grimwood*, 200 U. S. 561, 593, 26 S. Ct. 341, 350, 50 L. Ed. 596 (1905).

The compensation which petitioner is to receive for her property was neither agreed upon nor fixed by judicial inquiry. The first cause of action set forth in petitioner's complaint states specifically that the contract as drawn does not state the actual agreement between the parties (R. 14). Therefore, whether this is a result of mutual mistake, or mistake on the part of the petitioner and delib-

erate fraud on the part of respondent, the compensation set forth in the contract is not the agreed upon compensation but is in fact only one-twentieth of the value of the appropriated land. See *O'Donnell v. Clinton*, 145 Mass. 461, 14 N. E. 747 (1888). It must be noted here that, for the purpose of this proceeding, these allegations must be accepted as true. *Locke v. Pembroke*, 280 N. Y. 430, 21 N. E. 2d 495 (1939).

Petitioner's second cause of action, which also must be accepted as true for the purpose of this proceeding, alleges deliberate fraud on the part of the respondent (R. 15). Compensation fraudulently determined is not "just compensation" and, *a fortiori*, fraudulently determined compensation in the amount of one-twentieth of the "fair and full equivalent for the thing taken" is not just compensation.

The remedy of the petitioner, therefore, was to apply to the Courts to either rescind the agreement or to reform it according to the actual intent of the parties to express the true consideration which had been agreed upon. The act of the State Court in sustaining the defense of the sovereign immunity of the respondent, in effect, bound the petitioner to accept the "unjust compensation" set forth in the agreement and therefore operated to deprive petitioner of her property without due process of law. *McCoy v. Union Elevated R. Co.*, 247 U. S. 354, 38 S. Ct. 504, 62 L. Ed. 1156 (1918).

> "* * * it must be observed that the prohibitions of the Amendment refer to all the instrumentalities of the State, to its legislative, executive, and judicial authorities and, therefore, whoever by virtue of public position under a State government deprives another of any right protected by that Amendment against deprivation by the State 'violates the constitutional inhibition; and as he acts in the name and for the

> State, and is clothed with the State's power, his act is that of the State.' This must be so, or, as we have often said, the constitutional prohibition has no meaning, and 'the State has clothed one of its agents with power to annul or invade it.'" *Chicago B. & Q. Ry. Co. v. Chicago*, 166 U. S 226, 233, 234, 17 S. Ct. 581, 583, 41 L. Ed. 979, 983, 984 (1897).

Respondent contends, on page 18 of its brief, that the immunities granted to the states by the Eleventh Amendment cannot be deemed forbidden by the Fourteenth. In this connection, it is sufficient to point out that the Fourteenth Amendment was passed subsequent to the Eleventh Amendment and after a great civil war had been fought over the rights of the state, and said amendment is by its terms a direct limitation upon the states. *Home Telephone & Telegraph Co. v. City of Los Angeles*, 227 U. S. 278, 33 S. Ct. 312, 57 L. Ed. 510 (1913).

On page 19 of respondent's brief, the contention is made that the essence of petitioner's complaint is that she agreed to accept a wholly inadequate sum as compensation. Nothing in the pleadings sustains this contention. The allegations in the pleadings in fact are to the contrary in that the written agreement never contained the agreed upon compensation. *O'Donnell v. Clinton*, 145 Mass. 461, 463, 14 N. E. 747, 750 (1888).

Respondent further contends (at page 19) that as long as compensation is made or provided for, no matter how small the amount may be, no substantial Federal question is presented. In the cases cited by the respondent in support of this contention, full and complete hearings had been held. Thus, in *Appleby v. Buffalo*, 221 U. S. 524, 31 S. Ct. 699, 55 L. Ed. 838 (1910), the New York Court of Appeals had expressly considered the facts of the case and determined that the owner was not entitled to more

than the nominal damages that had been awarded by a board of commissioners. Since credible evidence to that effect had been introduced (unlike the instant case), the Court held that the petitioner had received a proper hearing during which he excepted to no errors of law, and therefore he could not complain that his compensation was not just. This is far different from saying that any compensation is "just" compensation. The distinction between that case and the instant one is transparent. There has been no claim or evidence that the value of petitioner's land is as low as the amount specified in the contract. In fact, since this appeal arises out of a motion to dismiss, it must be conceded that its value was the amount alleged, *viz.* twenty times the amount in the contract. Considering this point, and the lack of any review of the amount of the contract, the inapplicability of *Appleby, supra,* becomes evident.

There is no difference between the execution of a contract by fraud and the execution of a contract by force. In either event, to limit the compensation of the petitioner to the terms fixed by such a contract would be violative of due process.

II

A.

In Point II of its brief, the respondent takes great pains to show the identity of the Thruway Authority with the state (at pages 20-23). It is, however, equally possible to set forth numerous sections of New York law which substantially differentiate it from the state.

> "We note, simply for purposes of illustration—for it by no means exhausts the list—that the Authority is expressly empowered to 'make contracts,' 'acquire

> • • • real property', 'borrow money and issue [its own] negotiable • • • obligations' without public referendum and, significantly, 'accept any gifts or • • • grant of funds or property • • • from the state of New York' (Section 354) and become 'indebted to the state' (Section 357). The notes and bonds issued by the Authority are its primary obligation, the State's obligation being merely that of a guarantor (Section 366), and only to the maximum amount of $500,000,000 (N. Y. Const., art. X, Section 6). If, as asserted, there was an identity between Authority and State it is difficult to perceive how the Authority could receive gifts from, or become indebted to, the State and, quite obviously, the latter's guaranty of the Authority's obligations would be superfluous and unnecessary. Finally, we would add that traffic control upon the Thruway is exercised by the Authority and not by the State through its Traffic Commission (Public Authorities Law, Section 361).
>
> As would, of course, be expected, the cases confirm the conclusion that a public authority enjoys an existence separate and apart from the State, even though it exercises a governmental function (see, *e.g.*, *Malone v. State of New York*, 1 N. Y. 2d 837; *Pantess v. Saratoga Springs Auth.*, 255 App. Div. 426), and nothing decided or said in *Easley v. New York State Thruway Auth.* (1 N. Y. 2d 374) detracts from the force of what we have written." *Plumbing, Heating, Piping and Air Conditioning Contractors Association, Inc. v. New York State Thruway Authority*, 5 N. Y. 2d 420, 424, 185 N. Y. S. 2d 534, 536-537 (1959).

The respondent, in order to reinforce its argument regarding the close relationship of the state, cites many cases in support of its contention that it is engaged in a governmental function (at pages 24-28). However this may be, there appears to be little value in introducing into this area the governmental vs. ministerial distinction which has plagued the Courts over the years. Borchard, *Government Liability in Tort*, 34 Yale L. J. 1.

Although New Jersey, for example, held in *Muszynski v. New Jersey Turnpike Authority*, 27 N. J. Super. 248, 99 A. 2d 326 (1953) (cited on page 26 of respondent's brief) that the Turnpike Authority was engaged in a governmental function, the law in New Jersey is clear that the sovereign immunity of the state does not extend to the Turnpike Authority.

> "It would seem that in all justice such authorities should generally not be afforded the highly special immunities of the State acting in its sovereign capacity." *Taylor v. New Jersey Highway Authority*, 22 N. J. 454, 470, 126 A. 2d 313, 322 (1956).

The confusion which results from attempting to delegate the immunity of the state to other agencies is apparent from respondent's own brief. Thus, at page 30, respondent quotes from *Matter of Hamptonburg School District*, 303 N. Y. 484, 104 N. E. 2d 866 (1954) which states that a municipality is possessed of the same immunity from suit as the state,* and on page 34 of its brief, respondent quotes from *The Onteora*, 298 Fed. 553 (S. D. N. Y. 1923), which indicates that it is not. This confusion, coupled with the added difficulty of opening the door to the governmental vs. ministerial distinction mentioned previously, makes it especially important that this Court limit the doctrine of sovereign immunity to the state and not to any of its agencies or subdivisions.

The dangers inherent in the extension of the doctrine of sovereign immunity to a Public Authority were pointed up in a note which discusses the *Benz* case (the case at bar) and *New York Post Corp. v. Moses*, 10 N. Y. 2d 199, 219 N. Y. S. 2d 7 (1961) which followed it. "As a result of these decisions the public corporation is put in the

* *Cf.* Lincoln County v. Luning, 133 U. S. 529, 10 S. Ct. 363, 36 L. Ed. 766 (1890).

unique position of having all the advantages of government and none of the disadvantages of a private body. This presents a fertile area for sovereign irresponsibility." NOTE, *The Public Authority and Sovereign Immunity*, 11 Buffalo L. Rev. 57, 60 (1961).

Petitioner does contend, however, that even if the state could extend its immunity to the public authority, it is not immune from a claim for a deprivation of a right guaranteed by the Fourteenth Amendment.

On page 32 of its brief, respondent attempts to explain away the reference in Nichol's *Law of Eminent Domain* to the effect that a release obtained by fraud may be voided, by agreeing to the principle, but stating that the respondent is not amenable to suit. It should be noted that the reference was taken from a work, and a section of that work, which deals with the taking of private property by a public body.

Larson v. Domestic & Foreign Finance Corp., 337 U. S. 682, 69 S. Ct. 1457, 93 L. Ed. 1628 (1949), which is discussed on pages 36-37 of respondent's brief, did not involve the deprivation by a state of a right guaranteed by the Fourteenth Amendment. Neither the majority opinion (as is indicated at page 25 of the petitioner's brief) nor the dissent, set forth the proposition that a state may, with impunity, deprive its citizens of such rights. Indeed, in *Home Telephone & Telegraph Co. v. City of Los Angeles*, 227 U. S. 278, 33 S. Ct. 312, 57 L. Ed. 510 (1913), the concern was whether the action complained of was sufficiently connected to the state so as to come within the proscription of the Fourteenth Amendment. In the light of the history of the Fourteenth Amendment, it is difficult to conceive of the doctrine of sovereign immunity being interposed to avoid relief for a violation of its guarantees.

B.

Respondent's final contention is that alternative relief is available to the petitioner in the Court of Claims. It states first that petitioner might bring an action for deceit. This contention was made before the Court of Appeals and, in spite of this, that Court held petitioner to be without remedy. A cause of action for deceit clearly does not suffice for the petitioner. It not only fails to take into consideration that portion of petitioner's claim which involves the mutual mistake of fact, but it also fails to satisfy the basic constitutional objection to the taking of petitioner's property without the payment of just compensation.

Respondent then goes on to state that petitioner is authorized to sue in the Court of Claims and that Court has power to grant equitable relief. The New York Court of Appeals in *Psaty v. Duryea*, 306 N. Y. 413, 416, 118 N. E. 2d 584, 586 (1954), stated clearly, "It seems to be conceded that the Court of Claims has, under Section 9 of the Court of Claims Act, no jurisdiction to grant strictly equitable relief, but to award money damages only against the State, in appropriate cases." Furthermore, such a possibility was not even mentioned by the Court of Appeals in the instant case, but was excluded when that Court specifically held petitioner to be "without any remedy".

Lastly, respondent asserts (at page 40) that the statute of limitations has expired and that this was "necessarily the basis of the Court's statement." This contention by respondent is wholly unsupportable. The meaning of the Court of Appeals' statement that the petitioner was without any remedy was explained fully and completely in the case of *New York Post Corp. v. Moses*, 10 N. Y. 2d 199, 219 N. Y. S. 2d 7 (1961), where the Court stated (10 N. Y. 2d at page 203, 219 N. Y. S. at page 9):

> "Decisions such as Benz v. New York State Thruway Authority, 9 N. Y. 2d 486, 215 N. Y. S. 2d 47, are expressive of a constitutional and legislative policy that public authorities should be subjected only to those procedures which have been specifically mandated. '[T]here is no jurisdiction in any court of any suit against [an Authority] except as the Legislature has in terms created such jurisidiction' (*supra*, 9 N. Y. 2d at page 489, 215 N. Y. S. 2d at page 48)."

This conclusion followed logically from the case of *Easley v. New York State Thruway Authority*, 1 N. Y. 2d 374, 135 N. E. 2d 572 (1956), where the Court stated (1 N. Y. 2d at page 378, 135 N. E. 2d at page 574):

> "Because of sovereign immunity, none of the existing courts could take jurisdiction over such claims unless the Legislature should so permit."

The Court of Appeals in the *Benz* case, having found that there was no remedy mandated by the legislature against the Thruway Authority to grant petitioner any relief, consequently found that the petitioner was "without any remedy". NOTE. 11 Buffalo L. Rev. 57.

The statement by the Court of Appeals that petitioner is "without any remedy" is absolute and unqualified under the present state of the New York Law, there is no support whatever for respondent's contentions that other remedies are available. It is petitioner's contention, however, that the conclusion of the Court of Appeals in the *Easley* case, *supra*, is in error to the extent that it acts to deprive the petitioner of her rights under the Fourteenth Amendment.

In footnote 16 on page 38 of respondent's brief, counsel recognizes that the New York State Supreme Court had jurisdiction over the Thruway Authority in tort actions until the New York State Legislature conferred exclusive jurisdiction for such actions on the Court of Claims by Section 361-b of the Public Authorities Law.